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ABSTRACT

This packet of three booklets, which includes a student guide, textbook, and handbook, is illustrative of other booklets available from the Treasury Law Enforcement School designed for training law enforcement officers in Federal law. The material in this course, related primarily to criminal cases, focuses on presenting evidence to the court to prove the question at issue and on learning the necessary rules which need to be followed in presenting the government's case. The seven chapters of the student text provide an introduction on evidence, general concepts of evidence, hearsay, admissions and confessions, witnesses, documentary and real evidence, and advice of rights. The student guide outlines discussion of the seven chapters in the text. Five case studies are presented which give the officer in training an opportunity to apply the material contained in this course. A memorandum discussing the major problems that have arisen in the Federal Courts involving the interpretation on Miranda vs. Arizona is incorporated into the student handbook. (SJM)

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EVIDENCE STUDENT GUIDE 14 (2-72)

STUDENT GUIDE

COURSE 14:	EVIDENCE
PART 1:	INTRODUCTION
STUDENT ASSIGNMENT:	Required Reading: Pre-class Evidence, TLES Text 14, Chapter 1 Optional Reading Handbook of the Law of Evidence John E. Tracy, pages 1 - 8

INTRODUCTION

The material in this course is designed to benefit those involved in federal law enforcement. Most of the material will relate to criminal cases.

We are concerned with what we can offer before the court to prove the question in issue and what rules we must follow in presenting the government's case.

In criminal cases the question in issue is the guilt or innocence of the defendant.

At the completion of this part of the course, you should be able to:

(1) Define evidence.
(2) Define what is meant by rules of evidence and explain their necessity.
(3) Name and describe the usual steps in a jury trial from opening statements to verdict.
(4) Define direct and circumstantial evidence and give an example of each.

DISCUSSION

1. EVIDENCE

Anything legally offered before a court for the purpose of proving or disproving the question or questions in issue.

2. RULES OF EVIDENCE

Principles regulating the admissibility, relevancy and sufficiency of evidence in legal proceedings.

3. OUR JUDICIAL PROCESS

(1) The parties, issues, trial, verdict & sentencing.

(2) The subject of evidence is concerned in the trial process.

(3) The trial process

- (a) Opening statements
- (b) Presentation of government's case
- (c) Motion by defense for judgment of acquittal
- (d) Presentation of defendant's case
- (e) Rebuttal
- (f) Closing arguments
- (g) Instructions to the jury

4. EVIDENCE AND PROOF DISTINGUISHED

Proof is the result of evidence. Evidence is therefore the medium of proof.

5. REASONS FOR THE RULES OF EVIDENCE

5.1 Development of the jury system

5.2 Necessity for rules

- (1) To present cases in orderly manner
- (2) To confine evidence to issues before court
- (3) To insure authenticity of evidence
- (4) To exclude privileged communications

5.3 Rules in Federal Court

- (1) Criminal cases
- (2) Civil cases

6. DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE

6.1 Direct evidence

6.2 Circumstantial evidence

SUMMARY

Evidence is offered before the court to prove the question in issue.

Rules for criminal cases are not the same as the rules for civil cases.

Evidence is given certain classifications, the main ones being direct and circumstantial.

STUDENT GUIDE

COURSE 14:	EVIDENCE
PART 2:	GENERAL CONCEPTS OF EVIDENCE
STUDENT ASSIGNMENT:	Required Reading: Pre-class Evidence, TLES Text 14. Chapter 2 SG 14.2 Optional Reading: Handbook of the Law of Evidence, Tracy. Pages 18-19, 44-54.

INTRODUCTION

We will build a foundation in our study of evidence on which we can make a deeper study into those areas of evidence which relate to our job as enforcement officers.

When we finish our discussion on the general concepts of evidence, you should be able to:

(1) define relevancy, materiality, and competency, and give an example of each.
(2) define burden of proof.
(3) define conclusive and rebuttable presumptions. Give one example of a conclusive presumption and six examples of rebuttable presumptions.
(4) Define judicial notice and give four examples.
(5) Explain the theory and process of connecting separate items of evidence in developing the prosecution of a criminal trial.

DISCUSSION

1. ADMISSIBILITY OF EVIDENCE

That quality which makes evidence acceptable in court.

1.1 Relevancy

Relationship to fact in issue.

1.2 Materiality

Tendency to cast light on subject in dispute, affect outcome of trial, or help establish guilt or innocence of accused.

1.3 Competency

Legal adequacy and sufficiency. Not barred by any exclusionary rule.

2. FUNCTIONS OF THE JUDGE AND JURY

(1) Judge decides questions of law.

(2) Jury decides questions of fact.

3. BURDEN OF PROOF

3.1 Criminal case

3.2 Reasonable doubt

3.3 Civil case

3.4 Intent

The exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done.

4. PRESUMPTIONS

4.1 Definition

A rule of law that certain conclusions are to be inferred from certain facts; an inference as to the existence of one fact from the existence of another fact.

4.2 Inference

4.3 Conclusive presumption

4.4 Rebuttable presumption - Continues until it is overcome by evidence to the contrary

Examples:

(1) Defendant in criminal case is presumed innocent until proved guilty.

(2) Individual charged with crime is presumed sane.

(3) A person intends natural and probable consequences of acts.

(4) Narcotics are possessed illegally.

(5) Control of narcotics presumes ownership.

(6) Person found at still site is presumed to be carrying on business of a distillery without posting bond.

(7) Signing an instrument presumes knowledge of contents.

(8) Proof that a letter, properly stamped and addressed, was mailed and not returned creates a presumption that it was received.

(9) Fabricator of evidence creates presumption against self.

(10) Destruction, mutilation, or concealment of books and records or other evidence creates presumption that production would be unfavorable to person destroying them.

(11) Public officers perform their duties according to law and do not exceed their authority.

5. JUDICIAL NOTICE

5.1 Definition

Acceptance by a court of certain facts without proof, because they are matters of common knowledge of of every person of ordinary understanding and intelligence.

5.2 Distinguished from presumptions

Examples of Judicial Notice

(1) Geographical facts

(2) Historical facts

(3) Scientific facts and principles

(4) Laws of nature

(5) Matters of general knowledge

(6) Weights and measures

(7) Physical properties of matter

(8) Federal and state statutes, Federal Regulations and Procedures (published in Federal Register)

6. USE OF INFERENCE IN PROVING A CASE

6.1 Chain of evidence

STUDENT GUIDE

COURSE 14:	EVIDENCE
PART 3:	HEARSAY
STUDENT ASSIGNMENT:	Required Reading: Pre-class Evidence, TLES Text 14. Chapter 3 SG 14.3 Optional Reading: Handbook of the Law of Evidence, Tracy Pages 218-220; 229-231; 245-248; 250-258; 261-284; 300-307

INTRODUCTION

During this discussion you should learn what constitutes hearsay and why it is generally inadmissible in court. You will also learn why there are certain exceptions to the hearsay rule and how they apply to criminal cases.

At the completion of this part of the course, you should be able to:

(1) Define and give two examples of hearsay, and state why it is generally inadmissible.
(2) State the reason for exceptions to the hearsay rule and relate the two factors considered by the court in allowing exceptions.
(3) State four exceptions to the hearsay rule and give an example of each.

DISCUSSION

1. HEARSAY

1.1 Defined as statements made by a witness on the authority of another and not from personal knowledge or observation.

1.2 Generally inadmissible.

1.3 Trustworthiness and reliability.

2. EXCEPTIONS TO THE HEARSAY RULE

2.1 Reason for exceptions

2.2 Factors considered

(1) Trustworthiness and reliability

(2) Special necessity in the particular case

3. PUBLIC RECORD

3.1 Definition

3.2 Protective circumstances

3.3 How introduced

4. BUSINESS RECORDS

4.1 Definition

4.2 Business Records Act (28 U.S.C. 1732)

4.3 How introduced

5. FORMER TESTIMONY

   (1) Witness is unavailable

   (2) Parties and issues are the same

   (3) Opportunity to cross examine when witness previously testified

6. RES GESTAE

6.1 Translated as being "things done"

6.2 Spontaneous statements

7. DYING DECLARATIONS

8. STATEMENTS AGAINST INTEREST

   (1) Against interest of declarant

   (2) Declarant is unavailable

   (3) The interest existed and its existence was known at time of declaration

9. CHARACTER AND REPUTATION

   (1) No presumption as to character

   (2) Prosecution may not raise issue

   (3) Defense may place character in issue through witnesses as to his reputation in community at time of alleged offense.

   (4) Neither defense nor government witnesses may testify about specific acts or their own observation or knowledge.

(5) Prosecution may cross examine defense witnesses as to knowledge of specific instances of defendant's conduct and may introduce its own reputation witnesses

(6) If defendant takes stand, prosecution may question him on cross examination as to prior convictions.

(7) Prosecution may not introduce evidence of other crimes to prove character, but may do so with court's permission and its admonition to jury to consider it only for limited purpose of finding motive, modus operandi, intent, opportunity, knowledge, etc.

SUMMARY

List the exceptions to the hearsay rule that we have covered in our discussion.

1. Hearsay evidence is generally inadmissible.
2. Certain exceptions are permitted to prevent injustice.
3. Court considers trustworthiness and necessity before admitting hearsay.

STUDENT GUIDE

COURSE 14:	EVIDENCE
PART 4:	ADMISSIONS AND CONFESSIONS
STUDENT ASSIGNMENT:	Required Reading: Pre-class Evidence, TLES Text 14. Chapters 4 & 7 SG 14.4 Optional Reading: Handbook of the Law of Evidence, Tracy. Pages 240-245

INTRODUCTION

We will discuss the differences between an admission and a confession and how they must be secured so that they are legally admissible before the court.

After our discussion you should be able to:

(1) Define admissions and confessions, and state the types of each.
(2) Distinguish between judicial and extra-judicial admissions and confessions.
(3) State and explain the prerequisites for the admissibility of an admission or confession.
(4) Identify situations in which an individual must be advised of his constitutional rights, including his rights as defined in Miranda v. Arizona.
(5) Recite substantially verbatim and explain the meaning of the rights set forth in Miranda v. Arizona in the form prescribed by the various agencies.

DISCUSSION

1. ADMISSIONS

1.1 Any statement (or act) by the accused which is offered in evidence against him.

1.2 Types of admissions

(1) Oral

(2) Written

(3) Conduct

1.3 Classifications of admissions

(1) Judicial

(2) Extrajudicial

2. CONFESSIONS

2.1 A comprehensive statement by an accused covering every essential element necessary to make out the crime, acknowledging that he or she committed the offense.

2.2 Types of confessions

(1) Oral

(2) Written

2.3 Classification of confessions

(1) Judicial

(2) Extrajudicial

3. CORROBORATION

(1) Applies to admissions after alleged offense and all confessions.

(2) Defendant cannot be convicted solely upon his uncorroborated confession.

4. ADMISSIBILITY OF CONFESSION

4.1 Voluntary

4.2 Rule 5 (a), Rules of Criminal Procedure

4.3 Effect of delay in taking before magistrate

4.4 What constitutes unreasonable delay

4.5 Confession before illegal detention

4.6 Second confession after prior illegal confession

4.7 Admissibility of confession to charge other than the one for which arrested

4.8 Advice of rights

SUMMARY

List what you have learned concerning the securing of a confession which is legally admissible before the court.

1. Distinction between admission and confession

2. Types of admissions and confessions

3. Classifications of admissions and confessions

4. Necessity for corroboration

5. Admissibility of admissions and confessions

STUDENT GUIDE

COURSE 14: EVIDENCE

PART 5: WITNESSES

STUDENT ASSIGNMENT: Required Reading:
Pre-class
Evidence, TLES Text 14. Chapter 5
SG 14.5

Optional Reading:
Handbook of the Law of Evidence, Tracy.
Pages 135-144; 173-179; 183-199; 201-217

INTRODUCTION

During this period we will discuss the competency and credibility of witnesses; the theory of privileged communications; the examination of witnesses; self incrimination; and the testimony of expert witnesses.

At the end of this part of the course, you should be able to:

(1) Define the term "witness".
(2) Define the term "impeachment" and state two methods of impeaching a witness.
(3) Define the term "privileged communications" and give three examples.
(4) Explain the distinction between husband-wife "communications" privilege and the right of a defendant spouse not to have his spouse testify against him in a criminal trial.
(5) Relate under what circumstances a witness may refuse to answer questions under the 5th Amendment to the United States Constitution.
(6) Explain the effect of a grant of immunity in a trial in a state court upon compelling testimony in a subsequent federal trial, and vice versa.
(7) Explain the effect of the Fifth Amendment on compelling fingerprints, handwriting exemplars, and clothing try-ons.
(8) Define the term "expert witness", and state how a person may qualify to be such a witness and how he may be examined in court.

DISCUSSION

1. WITNESSES

1.1 Definition

A person who is capable of testifying as to what he knows about the facts in the case.

1.2 Competent - Means duly qualified. Meets all the necessary requirements.

1.3 Impeachment

Common ways of impeaching a witness:
(1) Self contradiction

(2) Showing of bias or prejudice

(3) Showing of insanity or intoxication at time of event or while on the stand, or the interval between the two

(4) Bad character; conviction of felony or crime of moral turpitude

2. PRIVILEGED COMMUNICATIONS

2.1 Attorney-Client

2.2 Husband and Wife

(1) Privilege as to communications

(a) Applies to confidential communications during marriage

(b) May be waived

(2) Testimonial privilege (common law incompetency)

(a) Spouse may not testify against other spouse who is defendant in criminal case while they are married, if defendant spouse objects.

(b) Does not apply where wife is the victim.

(c) May testify on behalf of each other.

2.3 Physician and patient

2.4 Clergyman and parishioner

2.5 Government and informant

(1) Informant used to establish probable cause - privilege may be claimed or waived by the Government

(2) No privilege where informant

(a) has participated in the crime

(b) has become a witness

3. EXAMINATION OF WITNESSES

3.1 Questioning procedure - order of witnesses

3.2 Direct examination

3.3 Cross examination

4. SELF INCRIMINATION

4.1 Fifth Amendment

4.2 Nontestimonial evidence

(1) Fingerprints

(2) Clothing

(3) Handwriting examplars

5. OPINION AND EXPERT WITNESSES

5.1 Requirements

5.2 Purpose

5.3 Qualification of expert

(1) By study

(2) By practice

(3) By experience or observations beyond that of ordinary person.

5.4 Examination of expert

(1) By hypothetical questions

(2) By own knowledge

(3) By comparisons

SUMMARY

1. Competency of witnesses
2. Privileged communications
3. Examination of witnesses
4. Self incrimination
5. Opinion and expert witnesses

STUDENT GUIDE

COURSE 14:	EVIDENCE
PART 6:	DOCUMENTARY AND REAL EVIDENCE
STUDENT ASSIGNMENT:	Required Reading: Pre-class Evidence, TLES Text 14. Chapter 6 SG 14.6 Optional Reading: Handbook of the Law of Evidence, Tracy. Pages 77-79

INTRODUCTION

We will discuss how a document is introduced into evidence and what is required if a copy of the original is to be used. Also, we will learn what is meant by a chain of custody, and real evidence.

At the completion of this period of instruction you should be able to:

(1) Define the best evidence rule.
(2) State the four situations in which secondary evidence may be permitted.
(3) Define the term "chain of custody" and state the requirements as to chain of custody.
(4) State the requirements for admissibility of demonstrations and comparisons.

DISCUSSION

1. DOCUMENTARY EVIDENCE

1.1 Best evidence rule

The best proof of the contents of a document is the document itself.

1.2 Exceptions permitting secondary evidence

(1) Original document is lost and a diligent search has been made.

(2) Original document is destroyed

(3) Original document is beyond the reach of the court process

(4) Original document is in the hands of the defendant

1.3 Authentication of public documents

(1) Certified copy

(2) Exemplified copy

1.4 Photographs and maps

(1) Admitted in discretion of court

(2) Must be relevant and material

(3) Must be an aid to the jury in understanding the case

2. REAL EVIDENCE

2.1 Chain of custody

Preservation by successive custodians of a physical object or document

2.2 Demonstrations and comparisons

(1) Must be based on evidence admitted in the trial (foundation must be laid)

(2) Must be an aid to the jury

(3) Must not be unduly prejudicial

(4) Witness should be prepared to explain method of preparation, sclae of charts made, and any other details

SUMMARY

1. Application of the Best Evidence Rule

2. Authentication of public documents

3. Chain of custody

4. Demonstrations and comparisons

COURSE 14:	EVIDENCE
PART 7:	REVIEW
STUDENT ASSIGNMENT:	Required Reading: Pre-class Read Student Guide 14.7 Write out the solutions to the case studies. Write out answers to the questions. Prepare to discuss and justify your solutions.

NOTE: You are not required to complete this assignment unless you are specifically instructed to do so. However, you may want to complete it in order to review the subject of Evidence and check your understanding of it.

As an alternative to this assignment there will be a test on the Evidence course, followed by a one hour critique.

INTRODUCTION

We will review the solutions and the answers you have prepared and determine if there is an understanding of the practical application of the material which we have presented during this course.

At this point in the Evidence course you should be able to apply the principles we have discussed to basic situations you are going to encounter in your work. Therefore, in completing this assignment, prepare yourself to discuss and justify your answers.

PRACTICAL EXERCISES

Case Study 1

During an investigation you question a person who may be involved in the violation. He will not talk with you until he has seen his attorney. You then arrange to meet him and his attorney at the attorney's office. The attorney advises the suspect not to answer any of your questions and therefore you learn nothing regarding the suspect. At the conclusion of the meeting you leave and go down the hall outside the attorney's law offices. While you are in the hallway, you overhear the suspect talking in a loud voice and making admissions regarding the violation. There is an open doorway from the hallway into a vacant office belonging to the attorney. You step into this room and hear the suspect make several admissions to his attorney in addition to what you already have heard. Later the suspect becomes a defendant in a criminal case. During a court recess you are walking down the hallway behind the defendant and his attorney. The defendant at this time makes additional admissions to his attorney regarding the crime, which you have not heard before

(1) Identify the principle (s) of evidence in this case.

(2) Which, if any, of these conversations and admissions could you be allowed to testify about?

Case Study 2

During your investigation you interview a third party witness who has knowledge of your suspect's illegal activity. He executes an affidavit and gives you several original business records, which are familiar to him and his business partner, and which tend to incriminate the suspect. The suspect is arrested and you go to trial. The day before the trial, this witness is killed in an automobile accident. Both the testimony of this witness and the business records, which are in the possession of the government, are essential in the case.

(1) Identify the principle (s) of evidence in this case.

(2) How will you introduce these items into evidence?

Case Study 3

You were introduced to the defendant by an informant whose identity is known to you. At the time of the introduction the informant made a buy of contraband. After the introduction you made three buys without the informant. The defendant has been indicted on the three buys of contraband you made. When you take the stand and testify, you get the dates mixed up and testify that you made a buy which in fact was the buy made by the informant in your presence. This error is brought out on cross examination and the defense demands to know the identity of the informant. The court agrees with the defense.

(1) Identify the principle (s) of evidence in this case.

(2) What do you think will be the outcome of this situation?

Case Study 4

You are testifying in a federal criminal trial. On cross-examination you are questioned regarding your authority to swear a witness to a statement.

(1) How will the basis for your authority be introduced into evidence?

(2) What is your authority?

Case Study 5

During an investigation you acquired original business records from a third party witness. You made photostats and returned the original documents. The third party witness was not available when you took the documents back and you left them with a person answering the door on behalf of the third party. At the trial the third party testifies that he does not have the original documents and that the last time he saw them was when he gave them to you. You then testify about what you did.

(1) Identify the principle (s) of evidence in this case.

(2) How will the information contained in the documents be admitted into evidence?

(3) What, if anything, should you have done during the investigation concerning this matter?

EVIDENCE

Review

QUESTIONS

Answer the following questions in writing:

1. Explain relevancy, materiality, and competency as they relate to evidence.

2. What weight of evidence is required to support a verdict of guilty in a criminal case? In a civil case?

3. What is circumstantial evidence?

4. Give an important presumption in regard to officers upon which the individual officer can rely in the performance of his duties.

5. What is required under Rule 5 (a) of the Federal Rules of Criminal Procedure?

6. Discuss when you are required to advise a person of his constitutional rights. Discuss the circumstances when you would not advise an arrested person of his constitutional rights.

7. What is the difference between an admission and a confession?

8. When must you divulge the name of an informant?

9. Distinguish between an expert and a lay witness. How do experts qualify to testify?

10. What is meant by impeachment? Explain three different ways by which a person may be impeached?

11. What is the "Best Evidence Rule"? To what kind of evidence does it apply?

12. What is the importance of a "chain of custody"?

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EVIDENCE TEXT 14 (4-72)

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CHAPTER 1 - INTRODUCTION

11. DEFINITION

Evidence is all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Investigators obtain evidentiary facts which tend to prove or disprove the ultimate, main, or principal fact. Legal evidence is admissible in court under the rules of evidence because it tends reasonably and substantially to prove a fact. Evidence is distinguished from proof in that the latter is the result or effect of evidence.

12. CLASSIFICATION OF EVIDENCE

Evidence is given classifications. Here are four classifications which are commonly used in the study and application of evidence:

(1) Direct evidence is that which proves the existence of the main fact without any inference or presumption. It is direct when the very facts in dispute are sworn to by those who have actual knowledge of them by means of their senses. An example of direct evidence would be the testimony of a federal officer concerning his purchase of counterfeit notes from the defendant who was charged with the sale of these same counterfeit notes. Here the very facts in dispute are sworn to by the testimony of the federal officer.

(2) Circumstantial evidence is that which tends to prove the principal fact by inference. The use of circumstantial evidence is recognized by the courts as a legitimate means of proof, and involves proving material facts which, when considered in their relationship to each other, tend to establish the existence of the main fact. It is the only type of evidence generally available to show such elements of a crime as malice, intent, or motive, which exist only in the mind of the perpetrator of the deed. An example of circumstantial evidence would be the testimony of a federal officer regarding his observation of the defendant when approaching the still site, in that he always approached through a very indirect route and at night, with his automobile lights turned off. When these facts are considered in their relationship to the main fact, it tends to prove the existence of the main fact, in this case the illegal operation of a distillery. Circumstantial evidence may be as convincing as direct evidence and the jury may find that it outweighs conflicting direct evidence.

(3) Documentary evidence consists of writings such as judicial and official records, contracts, deeds, and less formal writings such as letters, memorandums, and books and records of private persons and organizations. Maps, diagrams, and photographs are classified as documentary evidence.

(4) Real evidence, sometimes referred to as physical or demonstrative evidence, relates to tangible objects or property which are admitted in court. An example of real evidence would be the actual narcotics that the defendant smuggled across the border into the United States.

CHAPTER 2 - GENERAL CONCEPTS OF EVIDENCE

21. ADMISSIBILITY OF EVIDENCE

To be admissible evidence must be relevant, material, and competent.

21.1 RELEVANT

If a fact offered in evidence relates in some logical way to the main fact, it is relevant. The word relevant implies a traceable and significant connection. A fact need not bear directly on the principal fact. It is sufficient if it constitutes one link in a chain of evidence or that it relates to facts which would constitute circumstantial evidence that a fact in issue did or did not exist. One fact is logically relevant to another if, taken by itself or in connection with other facts, it proves or tends to prove the existence of the other fact. If the fact is logically relevant it is also legally relevant unless it is barred by some rule of evidence.

21.2 MATERIAL

Evidence is material if it tends to cast light on the subject in dispute, to affect the outcome of the trial, or to help establish the guilt or innocence of the accused. Not all relevant evidence is material, but all material evidence is relevant. For example, where the defendant has already acknowledged his own handwriting in court, proof of his handwriting through an expert would be immaterial because the fact has already been sufficiently proved.

21.3 COMPETENT

The terms relevant, material, and competent are not synonymous. Evidence must not only be logically relevant and sufficiently persuasive but also legally admissible, in other words competent. Relevant evidence may be incompetent and hence inadmissible because it is hearsay, or not the best evidence.

(1) The words "irrelevant" and "immaterial" usually refer more particularly to the statement sought to be elicited. Although incompetency may relate to documents, in many cases it may go to the person of the witness in that he may be under some disability which prevents him from testifying in the particular case. For example, a person is not competent to testify if he does not understand the nature of an oath or is unable to narrate with understanding the facts he has seen.

(2) As applied to evidence such as documents, evidence is competent if it was obtained in a manner, in a form, and from a source proper under the law. Examples of incompetent evidence are a confession involuntarily obtained or an unsigned carbon copy of a document which is offered without any explanation for the failure to produce the original.

21.4 REPORTING STANDARDS

A federal officer should obtain and report all facts which logically relate to the subject of his investigation. He should not omit any significant facts because of doubt regarding their relevance. There are no absolute and concrete standards for relevancy because the facts vary in each case. Therefore, judges have broad discretion in determining what evidence is relevant. Likewise, the federal officer should not omit evidence because of doubt as to its materiality or competency.

22. BURDEN OF PROOF

(1) Burden of proof is the obligation of the party alleging the affirmative of an issue to prove it. This burden remains on the Government throughout a criminal trial although the burden of going forward with the evidence may shift from one side to the other. When the party having the burden of proof has produced sufficient evidence for the jury to return a verdict in favor of such party, a prima facie case has been established. This does not mean that the jury will render such a verdict, but that they could do so from the standpoint of sufficiency of evidence. At this point the defendant has two choices. He may choose to offer no evidence, relying on the court and jury to decide that the Government has not overcome the presumption of innocence, or he may offer evidence in his defense. If he wishes to introduce new matters by way of denial, explanation, or contradiction, the burden of going forward with the evidence is his, although the prosecution still has the burden of proof with respect to the entire case.

(2) Criminal cases - In a criminal case, the Government must prove its case beyond a reasonable doubt. Proof beyond a reasonable doubt of every element of the crime charged is necessary for a conviction. In charging a jury as to the meaning of reasonable doubt, the judge in U. S. v. Sunderland [1] stated:

> "A reasonable doubt, is a doubt founded upon a consideration of all the evidence and must be based on reason. Beyond a reasonable doubt does not mean to a moral certainty or beyond a mere possible doubt or an imaginary doubt. It is such a doubt as would deter a reasonably prudent man or woman from acting or deciding in the more important matters involved in his or her own affairs. Doubts which are not based upon a reasonable and careful consideration of all the evidence, but are purely imaginary, or born of sympathy alone, should not be considered and should not influence your verdict. It is only necessary that you should have that certainty with which you transact the more important concerns in life. If you have that certainty, then you are convinced beyond a reasonable doubt. A defendant may not be convicted upon mere suspicion or conjecture. A defendant should be acquitted if the evidence is equally consistent with innocence as with guilt."

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[1] U. S. v. Sunderland, 56-2 USTC 9651 (D. C. Colo).

(3) Civil cases - In civil cases the burden of proof ordinarily is on the plantiff to prove his case, without any presumption against him at the outset. The degree of proof required in civil cases is a "preponderance of evidence", except where fraud is alleged. In the latter case, "clear and convincing evidence" is necessary in order to prevail in the fraud issue. Preponderance of the evidence is evidence that will incline an impartial mind to one side rather than the other. It does not relate merely to the quantity of evidence. Clear and convincing evidence is that which need not be beyond a reasonable doubt as in a criminal case but must be stronger than a mere preponderance of evidence.

(4) Intent - In the case of a crime where intent is an element of the crime, it is necessary to prove it through independent evidence. Intent is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done. Intent is to be distinguished from motive, which is the reason or inducement for committing an act. For example, an individual may deliberately understate his income in order to have sufficient funds to support invalid parents. While his motive may be admirable, he had a specific intent to evade payment of his income taxes, a criminal offense.

23. PRESUMPTIONS

(1) A presumption is a rule of law which permits the drawing of a particular inference as to the existence of one fact not certainly known from the existence of other particular facts. Although it is not evidence, it may be considered as a substitute for evidence. Any inference is a permissible deduction from the evidence and may be accepted or rejected by the trier of fact whether it be the court or a jury. It differs from a presumption in that the latter is a rule of law affecting the duty of proceeding with the evidence.

(2) Conclusive and rebuttable presumptions - A conclusive presumption is binding upon the court and jury and evidence in rebuttal is not permitted. For example, an infant under age of seven is not capable of committing a felony. This is a conclusive presumption which cannot be rebutted with any evidence. However, a rebuttable presumption is one which prevails until it is overcome by evidence to the contrary. Some examples are:

(a) A person is innocent until proved guilty.
(b) Individuals charged with a crime are presumed sane.
(c) A person intends the natural and probable consequences of his acts.
(d) Narcotics are possessed illegally.
(e) A person having control of narcotics is presumed to be the owner.
(f) A person found on a still site is presumed to be carrying on a business of a distillery without posting bond.
(g) A person signing an instrument is presumed to have knowledge of contents.

(h) Proof that a letter, properly stamped and addressed, was mailed and not returned to the return address, creates a presumption that it was received.
(i) A fabricator of evidence creates a presumption against himself.
(j) The destruction, mutilation or concealment of books and records or other evidence creates a presumption that the production of the records or evidence would be unfavorable to the person who destroyed them.
(k) It is presumed that public officers perform their duties according to law and do not exceed their authority.

24. JUDICIAL NOTICE

(1) To save time and expense, a trial judge may accept certain facts without requiring proof, if they are commonly and generally known, or can be easily discovered. This is known as the doctrine of judicial notice. Judicial notice of such facts takes the place of proof, and is of equal force. This does not prevent a party from disputing the matter.

(2) Requisites - A matter of judicial notice may be said to have three material requisites:

(a) It must be a matter of common and general knowledge;
(b) It must be well settled and not uncertain; and
(c) It must be known to be within the limits of the jurisdiction of the court.

(3) Examples - A federal court must take judicial notice of such matters as the Constitution; statutes of the United States (including legislative history); treaties; contents of the Federal Register, in which the Internal Revenue and other administrative regulations are published; and the laws of each state. Laws of foreign jurisdictions are not judicially noticed. A Federal court will judicially notice its record in the same case. It is not required to notice prior litigation in the same court, but the court may do so under certain circumstances where the prior proceedings are closely related, as in a contempt proceeding. Federal courts may also judicially notice such matters as scientific and statistical facts, well-established commercial usages and customs, and historical and geographical facts.

CHAPTER 3 - HEARSAY

31. DEFINITION

Hearsay has been defined as evidence which does not come from the personal knowledge of the witness but from the mere repetition of what he has heard others say. Hearsay is secondhand evidence and is generally excluded.

(1) Lack of opportunity for cross-examination is the principal reason for excluding hearsay testimony. As stated in the Papadakis case 1/:

> "The hearsay rule is concerned only with the reliability of evidence offered to prove a fact, whatever that fact might be. It operates to render inadmissible extrajudicial writings or declarations introduced to prove the truth of what was said or written, on the theory that such evidence, not being subject to the tests of cross-examination is not reliable. 5 Wigmore on Evidence, 1361."

(2) Cross-examination is essential as a test of the truth of the facts offered and provides an opportunity to test the credibility of the witness, his observation, memory, bias, prejudice, and possible errors. It also subjects the witness to the penalties of perjury and may eliminate deliberate or unintentional mis-statements of what has been told.

32. EXCEPTIONS

(1) The courts, in the interests of justice have made certain exceptions to the hearsay rule. The exceptions are based on two principal reasons:

(a) necessity for use, and
(b) probability of trustworthiness.

(2) The so-called necessity rule usually comes into being from the unavailability of the person who made the statement to appear and testify, and the court would thereby be deprived of evidence that is important in the decision of an issue. In addition to being necessary, the evidence must also have the probability of truthfulness that will substitute for cross-examination. Evidence that meets the above standards is admissible as an exception to the hearsay rule. Some of the more important exceptions relate to:

(a) Public Records
(b) Business Records
(c) Former Testimony
(d) Res Gestae
(e) Dying Declaration
(f) Statements Against Interest

1/ Papadakis v. U. S., 208 F 2d 945 (CA-9)

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(g) Character and Reputation
(h) Admissions and Confessions
(i) Expert and Opinion Testimony

32.1 PUBLIC RECORDS

(1) Public records made by an officer in the performance of his duties are admissible after proper authentication. 2/

(2) Statutory Provisions - The admissibility of official records and copies or transcripts thereof in Federal proceedings is covered by provisions of the United States Code and by rules of criminal and civil procedure.

(3) Authentication - The admissibility of official records and copies or transcripts thereof is provided for by the United States Code 3/ as follows:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> "(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

The method of authentication of copies of Federal records is set forth in the Federal Rules of Civil Procedure 4/ which is made applicable to criminal cases by Rule 27 of the Federal Rules of Criminal Procedure. Authentication of a copy of a Government record under these rules would consist of a certification by the officer having custody of the records and verification of the official status of the certifying officer by a Federal district judge over the seal of the court.

32.2 BUSINESS RECORDS

(1) Records made in the regular course of business may be admissible under the Federal statute which states:

> 5/"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in

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2/Rule 27, Federal Rules of Criminal Procedure
3/28 USC 1733
4/28 USC Rule 44
5/28 USC 1732 (a)

regular course of any business, and if it was the regular course of such business to make such memorandum of record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation and calling of every kind."

(2) The above statute permits showing that an entry was made in a book maintained in the regular course of businesswithout producing the particular person who made the entry and having him identify it.

(3) The essence of the "regular course of business" rule is the reliance on records made under circumstances showing no reason or motive to misrepresent the facts. The mere fact that a record has been kept in the regular course of business is not of itself enough to make it admissible. The rules of competency, relevancy must still be applied, the same as for any other evidence.

(4) When in the regular course of business it is the practice to photograph, photostat, or microfilm the business records mentioned above, such reproductions when satisfactorily identified are made as admissible as the originals by statute.[6] Similarly, enlargements of the original reproductions are admissible if the original reproduction is in existence and available for inspection under the direction of the court. This rule is particularly helpful in connection with bank records because of the common practice of microfilming ledgersheets, deposit tickets, and checks.

32.3 FORMER TESTIMONY

Former testimony of a previous trial or hearing is admissible provided:

(a) the witness is unavailable (has died, has disappeared, is mentally or physically incapacitated, or is beyond jurisdiction of the court),
(b) if the parties and issues are the same, and
(c) an opportunity for cross-examination has been afforded.

New trials may result from mistrials, failure of a jury to agree, or reversals after appeal.

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[6] 28 USC 1732 (b)

32.4 RES GESTAE

(1) Res gestae is a Latin phrase meaning "things done". It refers to spontaneous declarations and acts committed during the event and objects connected with it. The trustworthiness of such statements lies in their spontaneity, for the occurrence must be startling enough to produce a spontaneous and unreflected utterance without time to contrive or misrepresent. For example, when making entry into an apartment on a narcotic violation, one of the occupants says, "I knew Joe (the defendant) would get caught if he kept the "stuff" here". This would be considered a spontaneous declaration caused by the happening of the entry of the raiding party. Such statements may be made by participants or bystanders, and a person who made or heard such statements may testify about them in court. The trial judge has wide discretion in deciding the admissibility of unsworn statements as part of the res gestae.

(2) Mental and Physical Condition - Contemporaneous or spontaneous declarations of a person may be admissible to prove his mental or physical condition. While such statements carry more weight when made to a physician for purposes of treatment, they may be competent even if made to family members or other persons. 7/

32.5 DYING DECLARATION

Dying declarations are statements made by the victim of a homicide who believes that death is imminent. To be admissible, such statements must relate only to facts concerning the cause for and circumstances surrounding the homicide charged. They are admitted from the necessities of the case to prevent a failure of justice. Furthermore, the sense of impending death is presumed to remove all temptation of falsehood.

32.6 STATEMENTS AGAINST INTEREST

Statements against interest relate to oral or written declarations by one not a party to the action and not available to testify (illness, death, insanity, or absence from the jurisdiction). Such statements must be against the pecuniary or proprietary interest of the declarant and to make the statement trustworthy, the pecuniary interest must be substantial. For example, in order to establish that the defendant paid off a large debt with currency on a certain date, the Government may prove the payment through an entry in the personal diary of the deceased creditor. The diary could be identified by a relative of the deceased as having been found among his papers after his death.

32.7 CHARACTER AND REPUTATION

A defendant in a Federal prosecution may offer witnesses to testify to his good reputation in the community where he lives. Such evidence is

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7/Travelers' Insurance Company v. Mosley, 75 U. S. 397.

competent because it may tend to generate a reasonable doubt of his guilt.[8] The witnesses must confine their testimony to general reputation, and may not testify only about their own knowledge or observation of the defendant or about his specific acts or courses of conduct. Once the defense has raised the issue of character, the prosecution may offer evidence of bad reputation, in rebuttal of character testimony.

32.8 ADMISSIONS AND CONFESSIONS

(This material will be presented in Chapter 4)

32.9 EXPERT AND OPINION TESTIMONY

(This material will be presented in Chapter 5)

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[8] Michelson v. U. S., 335 U. S. 469

CHAPTER 4 - ADMISSIONS AND CONFESSIONS

41. ADMISSIONS

41.1 DEFINITION

An admission is any statement or act of a party which is offered in evidence against him. It may also be defined as a prior oral or written statement or act of a party which is inconsistent with his position at the trial. Admissions can be used either as proof of facts or to discredit a party as a witness. They can be used only as to facts, not as to matters of law, opinion, or hearsay.

41.2 TYPES AND CLASSIFICATIONS OF ADMISSIONS

(1) Admissions may be oral, in writing, or by conduct. They are classified as judicial or extrajudicial.

(2) Judicial Admission - A judicial admission is one made in the course of any judicial proceeding, by pleadings, stipulations (an agreement between the prosecuting attorney and defense counsel respecting certain facts in the case), affidavits, depositions, or statements made in open court. Such admissions may always be used against a party even in subsequent actions where there is a different adversary. A plea of guilty can be used as an admission in a civil action arising out of the same subject matter. Thus, a taxpayer's plea of guilty to tax fraud can be used as an admission concerning fraud in a civil suit involving the same acts. A plea of nolo contendere however, is not an admission. The entry of a judgment against a party is not an admission by him, since it may have been due to a failure of proof.

(3) Extrajudicial Admission - An extrajudicial admission is anything said outside of court by a party to litigation which is inconsistent with facts asserted in the pleadings or testimony in court. It is not limited to facts which are against interest when made, although the weight of an admission is increased if it is against interest at the time.

42. CONFESSIONS

42.1 DEFINITION

A confession is a statement of a person that he is guilty of a crime. It may be made verbally or in writing, to a court, officer, or to any other person. It may be merely an acknowledgment of guilt, or it may be a full statement of the circumstances.

42.2 CLASSIFICATION OF CONFESSIONS

A confession may be judicial or extrajudicial. A judicial confession is one made before a court in the due course of legal proceedings, including preliminary examinations. An extrajudicial confession is one made elsewhere than in court and may be made to any person, official, or otherwise.

43. CORROBORATION

Extrajudicial admissions by a person after his alleged commission of a crime require corroboration. The reason for this rule is to exclude the possibility of having a person convicted of a crime he did not commit, as a result of a statement or statements he made after the offense, induced by duress or other improper means. Admissions made before or during the alleged commission of a crime do not require corroboration, but those made after the alleged commission do require corroboration. However, confessions always require corroboration.

44. ADMISSIBILITY

44.1 VOLUNTARY

(1) It is essential to the admission of a confession that it be voluntary. An involuntary confession is one which has been obtained by physical or mental coercion, or by threats, or by promises of immunity or reduced sentence made by a person having authority with respect to the prosecution of the accused. The basis for excluding coerced confessions in the federal courts is that their use violates the due process clause of the Fifth Amendment, which reads:

> " ....nor be deprived of life, liberty, or property, without due process of law:"

(2) Determination of what is voluntary - Whether or not a confession is voluntary depends upon the facts of the case. 1/ It is not made involuntary and inadmissible solely because the accused's counsel was not present when it was made, although that fact may be considered. 2/ Physical or psychological coercion will invalidate a confession. 3/ Falsehood, artifice, or deception may also make it inadmissible. The Supreme Court has held that a confession extracted from the defendant by a boyhood friend who falsely represented that his involvement in the case might make him lose his job as police detective and jeopardize the future of his children and his pregnant wife, was an involuntary confession, especially since it came after continuous all-night questioning. 4/ An appeal to a person's religious feelings which induces him to confess does not invalidate the confession. The fact that a person was intoxicated when he confessed does not exclude the confession if he had sufficient mental capacity to know what he was saying. Expressions such as "you had better tell the truth", "better be frank", and "it will be best for you to tell the truth", could create controversy as to whether they constitute implied threats or promises. 5/

1/ Title 18, Sec. 3501, Admissibility of Confessions
2/ Spano v. N. Y., 360 U. S. 315
3/ Rogers v. Richmond, 365 U. S. 534
4/ See Spano v. N.Y. (supra, note 2)
5/ U. S. v. Abrams, 230 F 313

(3) Although the Government does not have the initial burden of proving that a confession was voluntary, the trial court must determine this by a preponderance of evidence as a preliminary question of fact. The accused may introduce evidence of its involuntary character. He may testify or call third persons, or he may cross-examine the prosecution witnesses. A proper foundation for admission of a confession is laid where the witness to whom it was made testifies that neither he nor anyone in his hearing made any promises or threats to the defendant.

(4) The Omnibus Crime Control and Safe Streets Act of 1968 states that the trial judge shall consider all the circumstances of the confession, including (1) time between arrest and arraignment, (2) whether defendant knew the nature of the offense charged, (3) whether he was advised or knew he was not required to make a statement and that it could be used against him, (4) whether he was advised prior to questioning of his right to counsel; and (5) whether he was without assistance of counsel when questioned and when giving the confession. 6/

44.2 DELAY IN TAKING ARRESTED PERSON BEFORE COMMITTING OFFICER

(1) Rule 5 (a) of the Federal Rules of Criminal Procedure provides that an arrested person must be taken before a magistrate or other committing officer without unnecessary delay. Thus, a confession taken from a person whose arraignment has been delayed unnecessarily so that he may be questioned over a period of time is inadmissible. 7/ Where a defendant arrested in the early afternoon was questioned until he confessed at 9:30 p.m. and the arresting officers then tried to locate a committing magistrate, before whom the defendant was taken the following morning, the court held the confession inadmissible and stated:

> "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession." 8/

(2) The fact that a confession was obtained after a person was arrested does not of itself bar its use at trial. 9/ There would also have had to be unnecessary delay. No hard and fast rule can be laid down as to this. Each case stands on its own facts. 10/ Circumstances vary from case to case, and from metropolitan areas where there may be several available magistrates, to other areas where there may be only one serving part time.

6/ 18 U.S.C. 3501 (b)
7/ Mc Nabb v. U.S., 318 U.S. 332 (1942)
8/ Mallory v. U.S., 354 U.S. 449 (1956)
9/ U.S. v. James Mitchell, 322 U.S. 65 (1943)
10/ U.S. v. Mihalopoulas, 228 F. Supp. 994 (D-D.C., 1964)

(3) The Omnibus Crime Control Act provides [11] that a confession during arrest or other detention is not inadmissible solely because of delay in bringing the arrested person before a magistrate or other officer if the trial judge finds it was voluntary and was made within six hours after arrest or other detention. The six-hour limitation shall not apply if the trial judge finds that delay beyond that period was reasonable considering the means of transportation and distance to the nearest magistrate or other officer. This Act was approved where an FBI agent received a confession from a prisoner in a state jail two days after arrest. The case held that the confession was voluntary, and that the legislative history of the Act made voluntariness rather than mere delay the real test of admissibility. [12]

44.3 ADVICE OF RIGHTS

(1) The Supreme Court held in the Miranda case [13] that before a confession could be admissible the defendant had to be advised of his right to remain silent; that anything he said could be used against him in any legal proceedings; that he had the right to consult an attorney, and if he could not afford an attorney, one would be appointed; and that he could stop answering at any time. However, even if the statement is inadmissible in the prosecution's case in chief because it did not fulfill the requirements of Miranda, it may still be used to impeach credibility if defendant takes the stand in his own defense.[14]

(2) Waiver - If interrogation continues without an attorney, a heavy burden rests on the Government to show that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. An express statement that he is willing to proceed without an attorney, followed closely by a statement, may constitute a waiver. It will not be presumed simply from his silence after warnings are given or the fact that he made a confession.[15] Nor will the court consider that he made a valid waiver where he agreed to be interviewed but refused to continue if the officer took written notes, and the officer then failed to warn him that even his oral statement could be used against him.[16]

44.4 USE OF THE CONFESSION

If part of a confession is offered in evidence, the whole must be given if the defense requests. An involuntary confession is not admissible, and facts discovered through it are also inadmissible. [17]

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[11] 18 U.S.C. 3501 (c)
[12] U.S. v. Halbert, F 2d (CA-9, 1970)
[13] 384 U.S. 436 (1966)
[14] Harris v. New York, U.S. (1971)
[15] Miranda v. Arizona (supra, note 13)
[16] U.S. v. Frazier, F 2d (CA-D.C., 1971); Frazier v. U.S., 419 F 2d 1161 (CA-D.C., 1969)
[17] Wong Sun v. U.S., 371 U.S. 471 (1963)

CHAPTER 5 - WITNESSES

51. DEFINITION

A witness is a person who can testify as to what he knows from having heard, seen, or otherwise observed.

52. COMPETENCY

The judge rather than the jury determines the competency of a witness to testify. A witness will ordinarily be presumed to have the mental capacity to testify. That capacity may be challenged in situations involving (a) infants - the trial judge should decide if the child is sufficiently mature to make an intelligent statement of what he saw, heard, or observed, (b) mental derangement - an insane person usually will be permitted to testify if he (1) understands the obligations of an oath and the consequences of lying, and (2) can tell an intelligent story of what he saw take place, and (c) intoxication - the test as to a witness on the stand is whether he is capable of making an intelligent and truthful statement.

53. CREDIBILITY

The jury (or judge if a jury is waived) determines the weight and credibility of a witness' testimony. He is presumed to tell the truth. His credibility is judged by whether he had the capacity or opportunity to observe or be familiar with the subject matter of his testimony and to remember it. Among the matters affecting credibility are the witness' interest, bias, prejudice, demeanor on the stand, prior inconsistent statements, prior mental derangement, intoxication at the time of the transaction to which he testifies, and prior convictions of a felony or a crime involving moral turpitude. If a witness gives contradictory testimony the jury may accept the portion it believes and reject the remainder. It may reject his entire testimony if he has testified falsely as to a material point.

53.1 IMPEACHMENT

(1) In the impeachment of opposing witnesses the principal purpose is to lessen the likelihood that the court or jury will believe the witnesses' story. A witness may be impeached by bringing out other facts on cross-examination or through other witnesses:

(a) Proving that he made a statement out of court (it could be before a grand jury) that is inconsistent with his testimony on the witness stand provided (1) it is relevant to the case and (2) a foundation is laid by inquiring of the witness on cross-examination whether he did or did not make such a statement to a certain named person at a certain named time and place.

(b) Showing (1) bias, such as family relationship, friendship, gratitude, obligation, employment, hatred, injured feelings and the like, (2) interest growing out of the relationship between the witness and the cause of action, e.g.; partner, creditor or (3) corruption, such as acceptance of a bribe to testify, or expression of willingness to give false testimony.

(c) Establishing insanity or drunkenness at the time of the events testified to, or while on the stand, or in the interval between the two if it was of such a degree as to affect his mental faculties.

(d) Showing a bad reputation for truth and veracity in the community in which he resides, or

(e) Proving through cross-examination that the witness has been convicted of a specific crime, or putting into evidence a record of his conviction. Evidence of his arrest is not admissible. 1/ The test to be applied is whether the conviction inquired about tends to prove a lack of character with respect to the witness' credibility.

(2) In certain instances an impeached witness may be rehabilitated. If testimony as to his bad character for veracity has been given, testimony of his reputation for good character in that respect may be offered. If he has been impeached by showing that he made a prior statement inconsistent with his testimony on the stand, it may be shown that he made prior statements consistent with his testimony in certain situations. For example, the story of the witness may be assailed as a recent fabrication or evidence may be offered showing a cause for his bias. If so, it may be shown that the witness made a statement similar to his testimony on the stand before he had any reason to fabricate or prior to the occasion for bias.

(3) When a defendant takes the stand in his own defense he is subject to impeachment like any other witness. 2/ The law does not presume that a defendant is of good character; it merely prevents the prosecution from going into the matter during the original presentation of its case. 3/ When he takes the stand, he does so not only as a person accused of a crime, but also as a witness. As an accused, his character is not subject to attack unless he opens the question by offering evidence of his good character. Such evidence is to be considered by the jury on the issue of his guilt or innocence. Thus, if the defense offers evidence of good character (by testimony of the defendant or other witnesses) the prosecution can introduce evidence as to his bad character to be considered by

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1/ Michelson v. U.S. 335 U.S. 469
2/ U.S. v. Skidmore, 123 F 2d 604
3/ See Michelson v. U.S. (supra, note 1)

the jury on the same issue. As a witness, his position is different and the prosecution can offer evidence of his bad character for consideration not upon his guilt or innocence but upon his credibility as a witness.

53.11 IMPEACHMENT OF PARTY'S OWN WITNESS

(1) A rule of law exists in many jurisdictions that a party will not be allowed to impeach a witness he has called because by putting him on the stand the party has guaranteed his credibility. However, the prosecution may impeach a Government witness (a) whom it is under a legal obligation to call, (b) who has testified before a grand jury, or (c) whom the court compels it to call, if in each instance it was surprised or prejudiced by his testimony. 4/ Most courts now permit impeachment for self-contradiction particularly if the party calling the witness has been surprised by variances from the latter's previous attitude and statements. The impeaching matter must be limited to the point of surprise and should not be beyond removing damage caused by surprise. 5/

(2) The latitude allowed the prosecution in examining a hostile witness is wholly within the discretion of the trial judge. Questions may be in the nature of cross-examination and the witness may be asked if he made contradictory statements at other times. 6/ The United States attorney may read prior inconsistent statements which the witness has given Government agents and ask him to verify the truth of such prior statements.

54. PRIVILEGED COMMUNICATION

(1) There are certain special types of relationships in which information communicated by one person to the other is held confidential and privileged between them. The one to whom the information has been imparted cannot be compelled to divulge it without the consent of the other. There are four fundamental conditions, according to Wigmore: 7/

(a) The communications must originate in a confidence that they will not be disclosed;
(b) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
(c) The relation must be one which in the opinion of the community ought to be sedulously fostered;
(d) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

4/ Meeks v. U.S., 179 F 2d 319
5/ Culwell v. U.S., 194 F 2d 808
6/ Harman v. U.S., 199 F 2d 34
7/ 8 Wigmore (3rd Ed.) 2285

(2) Some of the more recognized relationships regarding privileged communication are:

Attorney - Client
Husband - Wife
Physician - Patient
Clergyman - Parishioner
Government - Informer

54.1 ATTORNEY - CLIENT

(1) The attorney-client privilege must be strictly construed. Mere attorney-client relationship does not make every communication by the client to his attorney confidential. The communication must have been made to the attorney in his capacity as such, employed to give legal advice, represent the client in litigation, or perform some other function strictly as an attorney. When it does apply, the privilege covers corporate as well as individual clients.8/ Basically, attorney-client privilege does not include a right to withhold the name of a client. 9/

(2) If the attorney is a mere conduit for handling funds, or the transaction involves a simple transfer of title to real estate, without consultation for legal advice, communications from the client to the attorney are not privileged.10/Neither are communications privileged which have been made in the course of seeking business rather than legal advice.11/The privilege is ordinarily inapplicable to communications made to a person who acts as both attorney and accountant, if they have been made solely to enable him to audit the client's books, prepare a Federal income tax return, or otherwise act purely as an accountant. 12/ However, some courts have held that a privileged communication can occur between a client and attorney in the process of preparing a tax return.13/A person who consults an attorney for help or advice in perpetrating a future crime or fraudulent act is not consulting him for the legitimate purpose intended to be protected, and communications by the client or intended client in connection with such consultation are not privileged. 14/

(3) A communication by a client to an attorney in the presence of a third person is no longer privileged, unless that person's presence is indispensible to the communication, e.g., the attorney's secretary. 15/ Likewise, a client's communication loses its privilege when the attorney relates it to a third person unless that person's services are necessary to furnishing the legal advice.

8/ Radiant Burners, Inc. v. American Gas Association, 320 F 2d 314
9/ Colton v. U. S., 306 F 2d 633
10/ McFee v. U. S., 206 F 2d 872
11/ Toothaker v. Orloff, 59-2 USTC 9604
12/ Olender v. U. S. 210 F 2d 795
13/ See Colton v. U.S. (supra, note 9)
14/ Genevieve A. Clark v. U. S., 289 U. S. 1
15/ Himmelfarb v. U. S., 175 F 2d 924

(4) There is no privilege between an accountant and his client under common law, or Federal law.[16] However, an accountant employed by an attorney,[17] or retained by a taxpayer at the attorney's request to perform services essential to the attorney-client relationship,[18] may be covered by the attorney-client privilege.

54.2 HUSBAND - WIFE

(1) Communications between husband and wife, privately made, are generally assumed to have been intended to be confidential, and are therefore held to be privileged. It is essential, however, that the communications must, from their nature, be fairly intended to be confidential. If it is obvious from the circumstances or nature of a communication that no confidence was intended, there is no privilege. [19] For example, communications between husband and wife voluntarily made in the presence of their children old enough to understand them, or other members of the family within the intimacy of the family circle, are not privileged.[20] Likewise, communications made in the presence of a third party are usually regarded as not privileged, and this has been held to be so even though the third party was a stenographer for one of the spouses, where the stenographer was not a person essential to the communication.[21]

(2) Privilege is not extended to communications made outside the marriage relation, as, before marriage,[22] or after divorce. [23] Further, the privilege applies only to communications and not to acts. The mere doing of an act by one spouse in the presence of the other is held not to be a communication. For example, in the Mitchell case[24] where a husband induced his wife to participate in a violation of Federal law and took the proceeds from her, it was held that the taking of money was an act, not a communication, and therefore not privileged. It has been held in an income tax case where the taxpayer's wife voluntarily turned over his business records to a revenue agent without his consent, that the records were not a communication between them. [25] It has also been stated that the privilege should not apply to situations where the wife is employed in her husband's business office, and she would learn only what any other secretary would learn. [26]

[16] Falsone v. U. S., 205 F 2d 734
[17] U. S. v. Kovel, 296 F 2d 918
[18] U. S. v. Judson, 322 F 2d 460
[19] Wolfle v. U. S., 291 U. S. 7
[20] Id.
[21] Id.
[22] U. S. v. Mitchell, 137 F 2d 1006
[23] Yoder v. U. S., 80 F 2d 665
[24] U.S. v. Mitchell (supra, note 22)
[25] U. S. v. Ashby, 245 F 2d 684
[26] U. S. v. Nelson E. Jones, unreported opinion No. 31442R (S.D. Calif.) 1948

(3) Communications remain privileged after termination of the marriage by death of one spouse. 27/ Likewise, the privilege as to communications made during marriage does not terminate by divorce. 28/

(4) With respect to husband and wife, there is some conflict of authority about who may waive the privilege. Some cases stated that the privilege belongs to both spouses and must be waived by both. It has also been held that the privilege is that of the defendant spouse alone, waivable only by him.

54.21 DISTINCTION - PRIVILEGED COMMUNICATIONS AND PRIVILEGE OF DEFENDANT SPOUSE IN CRIMINAL CASE (COMMON LAW INCOMPETENCY)

The distinction must be emphasized as between privileged communications between husband and wife, and a defendant's privilege in a criminal case not to have his spouse testify against him (based on common law incompetency). The "communications" privilege relates to communications made during marriage and intended to be confidential. It may be claimed by a husband or wife, in or out of court, or may be waived (sec. 54.2 (4), supra). The "testimonial" privilege (common law incompetency) relates to both communications and acts, no matter when they took place. It bars a spouse from testifying, while they are married, against the other who is a defendant in a criminal case, over objection of the defendant spouse (except where exception is made by case law). The "testimonial" privilege is terminated by divorce; the "communications" privilege continues even after divorce. Husband and wife are competent to testify for each other in criminal cases. 31/

54.3 PHYSICIAN - PATIENT

This privilege is covered by statutes in the various states, which will be recognized by federal courts sitting in those states. Federal courts have accepted the fact that communications by a patient to a physician while seeking professional advice are privileged. 32/ This privilege has not been extended to financial matters, such as amounts of fees paid for professional services.

54.4 CLERGYMAN - PARISHIONER

This privilege is also covered by state statutes, recognized by federal courts sitting in those states. It has been accepted in the federal courts that this privilege exists. 33/ The privilege has not been extended to financial matters, such as contributions made through a clergyman.

27/ 8 Wigmore (3rd Ed.) 2341
28/ Pereira v. U. S., 202 F 2d 830
29/ Hawkins v. U. S., 358 U. S. 74
30/ Stein v. Bowman, 13 Pet (38 U. S.) 209
31/ Funk v. U. S., 290 U. S. 371
32/ Mullen v. U. S., 263 F 2d 275
33/ Id.

54.5 GOVERNMENT - INFORMER

(1) This privilege allows enforcement agencies to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their annonymity, encourages them to perform that obligation. [34] The contents of a communication are not privileged unless they tend to reveal the informant's identity. [35]

(2) This privilege differs from all the others in that it is waivable only by the Government whereas the others are essentially for the benefit of the individual and waivable by him. Since the privilege exists in behalf of the Government and not the informant, the Government may waive it, and it is deemed to be waived if the informant is put on the witness stand. [36] To provide maximum security regarding their identity and existence, confidential informants should not be used as witnesses, placed in a position where they might become witnesses, or unnecessarily identified in court without their consent. Where disclosure of an informer's identity or the content of his communication is relevant and helpful to the defense of an accused or is essential to a fair determination, the trial court may order disclosure. If the Government then withholds the information, the court may dismiss the indictment.

(3) Generally, if it is shown that the informant participated in the act which is the basis for a criminal prosecution, the court will require disclosure of his identity. For example, where the informant has been used to buy narcotics or counterfeit money from the defendant, the courts have held that non disclosure was improper. On the other hand, where there is sufficient evidence to establish probable cause independent of the information received from the informant, the Government's claim of privilege has been sustained. As an example, in the Scher case, [37] where the defendant's automobile had been searched without a warrant, partly on the basis of an informant's information that bootleg alcohol was being transported, and partly because of the searching officers' own observation that the automobile, with its lights out, was being loaded with packages, the court upheld the privilege.

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[34] Roviaro v. U. S., 353 U. S. 53
[35] Id.
[36] U. S. v. Schneiderman, et al, 104 F Supp. 405
[37] Scher v. U. S., 305 U. S. 251

(4) If a federal officer, who has promised an informant that he would keep his identity confidential, is asked to disclose such identity on the witness stand and no objection to the question is made or sustained, he should not refuse to answer, but should state that he can not disclose the information on the ground that it was a privileged communication to an officer of the Government, and that he is bound by instructions not to disclose such information. He should maintain this position pending instructions from his superiors and advice from the United States Attorney. The officer's failure to disclose this information may have several results:

(a) The court may, if he thinks that no harm is done the defendant, uphold the officer;
(b) The court may dismiss the action;
(c) The officer's superiors may release him from his obligation; or
(d) If he persists in his refusal to answer, the court may find him in contempt.

55. EXAMINATION OF WITNESSES

(1) Direct examination - The party calling the witness will examine him. This is called direct examination. The purpose of direct examination is to bring out facts of the witness' own knowledge relating to the case being tried.

(2) Cross examination - When a witness has finished his direct examination, the opponent has the right to cross-examine him. The purpose of cross examination is to test the truth of the statements made by the witness. This is done by questions designed to:

(a) amplify the story given on direct examination so as to place the facts in a different light;
(b) establish additional facts in the cross-examining party's favor;
(c) discredit the witness' testimony by showing that his testimony on direct examination was contrary to circumstances, probabilities, and other evidence in the case; and
(d) discredit the witness by showing bias, interest, corruption, or specific acts of misconduct.

In view of such purposes, the courts allow a wide latitude on cross-examination and the cross-examiner may ask leading questions. Another method often used is to question the witness in such manner as to obtain apparent inconsistent statements by going over the same ground covered in the direct examination.

(3) The general rule in Federal courts with respect to witnesses other than defendants, is that questions asked on cross-examination must pertain to matters brought out on direct examination. The rule is liberally construed and where the direct examination opens a general subject,

the cross-examiner may go into any phase of that subject. If the cross-examiner wishes to obtain from the witness evidence on subjects not opened on direct examination, he must call him as his own witness and subject him to direct examination on such matters. 38/

56. SELF INCRIMINATION

(1) The Fifth Amendment covers all witnesses. A third party witness may not refuse to testify but may decline to give answers that may incriminate him 39/ under Federal or state law. 40/

(2) The privilege against self incrimination must be specifically claimed, or it will be considered to have been waived by the witness. 41/

(3) The privilege applies not only to answers on documents which would support a conviction. It extends even to those which might provide a link in the chain of evidence which could be incriminatory, and is available if there is a reasonable possibility that an answer might tend to incriminate. 42/ As stated by the Supreme Court in the Hoffman case: 43/

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result".

However, a witness is not justified in refusing to answer questions on the ground of possible self-incrimination where the statute of limitations has barred the possibility of prosecution. 44/

(4) It is improper for the prosecution to ask a witness in a criminal trial any question calculated to bring out the answer that he had refused to incriminate himself in a prior trial or proceeding. 45/

38/ U.S. v. Bender, 218 F 2d 869
39/ Hoffman v. U.S., 341 U.S. 479
40/ Murphy v. N.Y. Waterfront Commission, 378 U.S. 52
41/ Nicola v. U.S., 72 F 2d 780
42/ Blau v. U.S., 340 U.S. 159
43/ Hoffman v. U.S. (supra, note 39)
44/ U.S. v. Goodman, 289 F 2d 256
45/ U.S. v. Merle Long, 153 F. Supp 528

(5) The Fifth Amendment bars only the compulsory use of testimonial evidence against a person, i.e., his verbal or written statements. Thus, the privilege against self-incrimination

> "offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." 46/

Officers may take an arrested person's fingerprints by force if necessary for the purpose of identifying the individual and for detecting crime. Blood samples 47/ or hair samples 48/ may be taken from him without his consent. He may be required to try on items of clothing, 49/ or appear in a lineup. 50/ If he refuses to submit fingerprint or handwriting exemplars, the court may issue an order compelling him to do so. 51/ If he persists in his refusal, he may be convicted of contempt of court, 52/ or the prosecution may comment to the jury upon his refusal. 53/ However, taking writing exemplars has been held a search under the Fourth Amendment, requiring a search warrant or a warning and consent. 54/

57. EXPERT AND OPINION TESTIMONY

(1) Expert witnesses - An expert witness is one who has acquired ability to deduce correct inferences from hypothetically stated facts, or from facts involving scientific or technical knowledge. The trial judge determines whether his qualifications are sufficient. The court may appoint expert witnesses agreed upon by the parties or may select the expert itself. The expert advises the parties of his findings and he may be called to testify by the court or by either party. He may also be cross-examined. His testimony must be based upon facts personally perceived by or known to him or made known to him at the trial. The parties also may call expert witnesses of their own selection.

(2) Expert opinions are the conclusions of a person who has been qualified as an expert in his field and are admitted to aid the jury in its deliberations. Opinions of laymen may also be admitted into evidence under certain circumstances. For example, a police officer may give his opinion as to the speed of an automobile. The basis for permitting this is that the police officer has specialized experience beyond that of the ordinary person which would qualify him to give his opinion regarding this fact.

46/ Schmerber v. California, 384 U.S. 757 (1966)
47/ Id; Breithaupt v. Abram, 352 U.S. 432 (1957)
48/ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967)
49/ Holt v. United States, 218 U.S. 245 (1910)
50/ United States v. Wade (supra, note 48); Grimes v. United States, 405 F 2d 477 (CA-5, 1968)
51/ United States v. Rudy, 429 F 2d 993 (CA-9, 1970); Lewis v. United States, 382 F 2d 817 (CA-D.C., 1967); United States v. Vignera, 307 F. Supp. 136 (S.D. N.Y., 1969); United States v. John Doe, 295 F. Supp. 956 (D. Conn., 1968), affirmed 405 F 2d 436 (CA-2)
52/ United States v. Rudy (supra, note 52); United States v. Doe (Id.)
53/ United States v. Doe (Id.)
54/ United States v. Harris, F. 2d (CA-8, 1972)

CHAPTER 6 - DOCUMENTARY AND REAL EVIDENCE

61. BEST EVIDENCE RULE

(1) Documentary evidence is evidence consisting of writings and documents as distinguished from parol, that is, oral evidence.

(2) The best evidence rule, which applies only to documentary evidence, is that the best proof of the contents of a document is the document itself.

(3) The best evidence rule, requiring production of the original document, is confined to cases where it is sought to prove the contents of the document. Production consists of either making the writing available to the judge and counsel for the adversary, or having it read aloud in open court. Facts about a document other than its contents are provable without its production. [1] For example, the fact that a sales contract was made is a fact separate from the actual terms of the contract and may be proved by testimony alone.

(4) Notes, diaries, workpapers, and memorandums made by examining agents during an investigation ordinarily are not considered evidence. However, they may be used on the witness stand or prior to testifying as an aid to recollection or may be introduced into evidence by the adverse party if they constitute impeaching evidence. Any documents used by a witness while on the stand are subject to inspection by the defense. They should always be carefully prepared to insure that the whole truth is reflected because of their possible use in court.

(5) Certain documents, such as leases, contracts, or even letters, which are executed (signed) in more than one copy are all considered originals and any one of the copies may be produced as original.

(6) Proof of Lack of Record - It is sometimes desirable or necessary to prove that a search of official files has resulted in a finding that there is no record of a certain document. Rule 44 (b) of the Federal Rules of Civil Procedure makes the following provision for this:

> "Proof of Lack of Record. A written statement signed by an officer having the custody of an official record or by his deputy that after dilligent search no record or entry of a specific tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record of entry."

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[1] Chandler v. United States, 318 F. 2d 356 (CA-10, 1963)

(7) When an original document is not produced, secondary evidence, which could consist of testimony of witnesses or a copy of the writing, will be received to prove its contents if its absence is satisfactorily explained. Unavailability of the original document is a question to be decided by the trial judge, just as he decides all questions regarding admissibility of evidence.

(8) The reason for the rule is to prevent fraud, mistake or error. The best evidence rule will not be invoked to exclude oral testimony of one witness merely because another witness could give more conclusive testimony.

62. SECONDARY EVIDENCE

(1) All evidence falling short of the standard for best evidence is classed as secondary evidence. Stated in another way, when it is shown from the face of the evidence itself or by other proof that better evidence was or is available, the evidence is classified as secondary evidence.

(2) Secondary evidence may be either the testimony of witnesses or a copy of the writing. There is no settled Federal rule stating which of these is a higher degree of secondary evidence.

(3) Before secondary evidence of any nature may be admitted, there must be satisfactory evidence of the present or former existence of an original document, properly executed and genuine. It must be established that the original has been destroyed, lost, stolen, or is otherwise unavailable. In all cases, except destruction provable by an eyewitness, the party proving the document must have used all reasonable means to obtain the original, i.e., he must have made such diligent search as was reasonable under the facts. Some cases have specifically set the rule that search must be made in the place where the document was last known to be, or that inquiry must be made of the person who last had custody of it. In every case, the sufficiency of the search is a matter to be determined by the court.2/ If a document is offered as secondary evidence it must be shown to be a correct copy of the original.

(4) When the original document has been destroyed by the party attempting to prove its contents, secondary evidence of the contents will be admitted, if the destruction was in the ordinary course of business, or by mistake, or even intentionally, provided it was not done for any fraudulent purpose.

2/ Sellmayer Packing Co. v. Commissioner of Int. Rev., 146 F 2d 707

(5) In a civil case, secondary evidence of the contents of a document may be introduced if the original is in the possession of the opponent in the case, provided the party attempting to introduce the copy has first served a notice upon his opponent to produce the original, and the opponent has failed to do so. In a criminal case not involving corporate records, the Government may introduce secondary evidence of the defendant's records without showing prior notice to produce. 3/

63. CHAIN OF CUSTODY

Regarding real evidence, "chain of custody" is an expression usually applied to the preservation by its successive custodians of the instrument of a crime or any relevant writing in its original condition. Documents or other physical objects may be the instrumentalities used to commit a crime and are generally admissible as such. However, the trial judge must be satisfied that the writing or other real evidence is in the same condition as it was when the crime was committed. Consequently, the witness through whom the instrument is sought to be introduced must be able to identify it as being in the same condition as when it was recovered. Federal officers must therefore promptly identify and preserve in original condition all evidentiary matter that may be offered into evidence.

3/ Lisansky v. U. S., 31 F 2d 846 (CA-4, 1929)

CHAPTER 7 - ADVICE OF RIGHTS

71. THE MIRANDA CASE

71.1 THE DECISION (QUOTED FROM THE SUPREME COURT OPINION)

(1) "On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to 'Interrogation Room No. 2' of the Detective Bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.'

(2) "At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed to conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

(3) "We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."

71.2 SYNOPSIS OF THE RULE

(1) The decision states that when any individual is "taken into custody or otherwise deprived of his freedom of action in any significant way," and is subjected to "questioning initiated by law enforcement officers,". . ."he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may

knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

(2) Some exceptions are made to the warning and waiver requirements. As the Court said, "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." No warning or waiver is required. The reason, the Court said, is that "in such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." There is another exception for statements which are volunteered. As the Court said, "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

(3) The majority opinion said, "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." The opinion indicates that what the Court fears is not that the accused might confess but that he might be motivated or forced to confess by "the compulsion inherent in custodial surroundings. . . informal compulsion exerted by law enforcement officers during in-custody questioning . . . the compulsion to speak in the isolated setting of the police station. . . the government established atmosphere. . . in which their freedom of action is curtailed." (emphasis added). Or, as the majority said earlier, "By custodial interrogation (for which warning and waiver are required), we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

(4) The Miranda decision also could, and should, result in widespread police adoption of more professional and systematic methods of criminal investigation. Investigations should be made more complete and thorough, with a view toward proving the crime as much as possible outside the confession. Heavy emphasis should be placed on locating and interviewing all possible witnesses, and turning up every object of any kind which lends itself to scientifically proving or disproving the issues in the case. Better notes and records must be kept of everything learned in the case, searches and seizures must be made with greater attention to both legality and physical detail, and no clue or lead of apparent value should be neglected.

(5) Briefly stated, the law enforcement officer who must comply with the requirements of the Miranda decision has a problem in three different areas. These are as follows:

(a) Separating those persons to whom warnings must be given, and from whom a waiver of rights must be obtained, from those as to whom there are no such requirements.

(b) Giving the warning and proving in court that he gave it.

(c) Obtaining the waiver and proving in court that he did obtain it, when such is the case.

72. TO WHOM WARNINGS MUST BE GIVEN

72.1 THE LEGAL FORMULA IN GENERAL

(1) The Miranda decision holds that when the police (the word "police" is used here to mean all law enforcement officers) approach a person to question him for evidence of his own guilt, at a time when that person has been taken into custody or otherwise deprived of his freedom of action in any significant way, the police must first warn that person of his Fifth Amendment right against self-incrimination and obtain his waiver of that right if he is willing to give it. If the police fail to give the warning and obtain the waiver, the statement which they obtain from the accused will not be admitted as evidence in court. The same decision holds, however, that so long as the police are engaged in the fact-finding phase of the interrogation, and are questioning a person whom they have not "taken into custody or otherwise deprived of his freedom of action in any significant way," they may ask their questions without giving a warning of rights or obtaining a waiver and the statement which they obtain, if any, may be used in evidence.

(2) A moment's study of the rule will make it obvious that before any officer questions any person for evidence of his own guilt he first must determine whether the conditions under which the interrogation takes place are such that the accused will be held by the courts to have been taken into custody or otherwise deprived of his freedom of action in any significant way. The answer to this question determines whether the warning and waiver are necessary.

72.2 TAKEN INTO CUSTODY

The warning and waiver process is necessary whenever the police initiate questioning of any person, for evidence of his own guilt, after that person has been taken into custody. But what do the courts mean by the word "custody?"

(1) Actual Physical Custody

(a) It is not believed that there will be any substantial disagreement among the courts over what the police must do in those cases in which the questioning occurs while the accused is in the actual physical control of the law. Such a person is clearly "in custody" and the warning and waiver process is necessary if he is to be questioned about his own guilt.

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(b) Actual physical control will include any person who is at this moment under arrest or who is in any jail, prison or penitentiary. It will include any other situation of this general type. For example, if the accused lies wounded in a hospital bed and a police guard stands at the door of the room to prevent his departure he is in custody despite the fact that he has not yet been formally arrested.

(c) If the accused who is to be questioned for evidence of his own guilt is in the actual physical custody of the law, the warning and waiver procedure should be followed despite the fact that he is not technically under arrest. It is the actual custody that counts, not the name given to it.

(2) Probable Cause for Arrest; Arrest Warrant

(a) Has the accused been taken into custody, for the purposes of the Miranda decision, when (1) he is face to face with the officer, (2) the officer has a warrant for his arrest or probable cause to arrest without a warrant, and (3) the officer intends to arrest after he asks a few questions? Must the officer go through the warning and waiver procedure before he asks the accused those questions concerning guilt? It can be argued that in such a situation the arrest is only a formality - a technicality - and that the accused is as effectively in custody as if he were openly placed under arrest before the questions were asked. The question becomes more difficult when the officers know that an arrest warrant for this offense is outstanding. Suppose that under these conditions, the officers question the accused at high noon, openly and fairly, in his own home or office or on a busy street or sidewalk. Must they first give the warnings and obtain a waiver simply because the warrant is outstanding (assuming that the accused is unaware that a warrant has been issued)? Does the mere fact that a warrant is outstanding put any pressure on the accused when he does not know about it? The fact of the existence of the warrant, unknown to the accused, did not make the question custodial in nature, in U.S. v. Davis, 259 F. Supp. 496 (1966). We agree with this decision but suggest that until the position taken by the court in Davis becomes more firmly established by other court decisions it would be best to use the Miranda warning and waiver procedure whenever the officers begin an interrogation - under any condition - with the knowledge that a warrant for the accused is outstanding on this offense.

(b) The existence of probable cause for arrest does not automatically create custody for purposes of the *Miranda* decision. If the situation is not made custodial by other facts, the officers having probable cause to arrest may interrogate the accused about his own guilt, without warning of rights, and they may testify to his answers. If the rule were otherwise, the officers would be forced to decide the precise moment at which they have probable cause to arrest and then, at that very moment, discontinue the interrogation until the warnings were given and the waiver obtained. It is suggested here that the Supreme Court does not intend this result.

(c) If an arrest warrant is outstanding for the accused, and the officers are aware that such a warrant exists, the rule may prove to be different. The officers can hardly justify their interrogation under these circumstances, without warning and waiver, on the ground that they were engaged in an effort to sort out the facts of a crime and who committed it. They know who committed the crime - at least for probable cause purposes -and they are empowered to arrest him at this moment. Interrogation without warning and waiver under these circumstances may be interpreted by the courts as an attempt to evade the requirements of the Miranda decision, and thus a violation of it.

(d) Unless and until the courts rule to the contrary, it is suggested that when an officer is to interrogate a person for evidence of his guilt of a certain offense, and knows that a warrant of arrest for that person for that offense is outstanding, the officer should give the *Miranda* warnings and obtain a waiver, if the accused is willing to give it, before initiating the interrogation.

(3) On-the-Street Detention

(a) Some decisions indicate a judicial view that a person is not in custody simply because the police have stopped him on the street to ask him questions during the suspicion or fact-finding phase of an investigation. For example, in Brown v. U.S., 365 F2d 976 (1966), two officers on patrol at 4:30 a.m. saw a car with the tag light out, stopped it, and questioned the occupants about the light and an expired inspection sticker. During this detention, the officers heard their police radio giving out pertinent facts about a robbery which had just been completed at a place not far away. The officers questioned the men in the car about that robbery and then arrested them. In a footnote to the decision holding that the arrest was made on probable cause, the court said:

> "The police may, of course, question a citizen even though such questioning may involve a momentary 'detaining'. . . This form of questioning is not 'custodial interrogation' within Miranda v. State of Arizona."

(b) In White v. U. S., 222 A2d 843, two District of Columbia officers on patrol at 2:30 a.m. saw a man carrying an automobile battery. They stopped him, asked him about the battery, and he gave them an innocent explanation. The officers offered the man a ride to his car and he got into the police car. The explanation did not "check out" and was followed by another story and then an admission against interest and an arrest. Defendant appealed from conviction, claiming that the officer should not have been allowed to testify to the admission because an arrest actually was made when defendant first got into the police car and he should then have been warned of his rights before any further questions were asked. The court ruled in favor of the government, on the ground that the police interrogation was not custodial in nature. See also U.S. v. Littlejohn, 260 F. Supp. 278 (1966). Note that in Brown the accused stayed in his car, in Littlejohn the accused got out of his car at police request, and that in White the accused got into the police car on police invitation.

(4) Field Interrogation on the Sidewalk

The hospitalized victim of an assault by throwing acid told the officer that one Katherine Williams was the assailant. The officer and the victim's sister, who said she knew Katherine Williams, went to the subject's address and found her standing on the sidewalk near her home. The officer asked if she was Katherine Williams, and she replied in the affirmative. He then asked her if she had thrown the acid in the victim's face, and she admitted that she did. The questions were asked without warning of rights. The defense objected to the officer's testimony to the questions and answers. The court held that the officer could testify. The questioning was noncustodial; defendant was not in custody or otherwise substantially deprived of her liberty at the time when the questions were asked. People v. Williams, decided May 9, 1967, Appellate Division, New York Supreme Court, New York County, reported in Criminal Law Reporter, May 24, 1967.

(5) Field Interrogation on the Street

(a) A bank was robbed in New York State. An immediate police broadcast described the two robbers and the getaway car. Two police officers in a town 18 miles away, armed with shotguns, set up a roadblock and checked drivers' licenses and vehicle registrations for all drivers and cars coming through. Fifty minutes after the robbery, defendant drove up in a car quite different from the one described. He had a driver's license but no registration for this car. He had registrations for 3 other vehicles, none in his name. While searching in the glove compartment for registrations he moved a ski jacket that covered a suitcase on the floor. The officers asked to see the contents of the suitcase. The defendant handed the suitcase to one of the officers and told them to open it. They told him to open it. Defendant snapped the latches and as he did so said, "I am your man." The suitcase contained the loot. The court ruled for the prosecution on defendant's motion to suppress his admission of guilt, holding that this was general-on-the-scene investigation, noncustodial in nature, which produced a volunteered admission, for none of which the Miranda warnings are required. U.S. v. Kuntz, 265 F. Supp. 543 (1967).

(b) At 4:30 a.m., two District of Columbia police officers stopped a car operating without a tag light. While one officer questioned the driver, the other heard a police radio lookout for a suspect in a robbery just completed down the street from which this driver had come. Additional questions were asked and an arrest was made.

(c) The principal question at trial and on appeal was one of arrest. The Miranda question was not raised directly, but the Court of Appeals, affirming the conviction, did make this significant statement:

> ". . . we do not say that mere detention would give rise to an arrest in all circumstances. The police may, of course, question a citizen even though such questioning may involve a momentary 'detaining'. . . . This form of questioning is not 'custodial interrogation' within Miranda v. State of Arizona. . ." Brown v. U.S., 365 F2d 976 (1966).

(d) An informant of established reliability told a United States Treasury Agent, Alcohol and Tobacco Tax Division, that a certain man for whom the informant gave a name, address, and description, would on a certain date transport bootleg whiskey in a certain described automobile. Two agents went to the address early in the evening, after checking out a lead which tended to confirm the report. About an hour later, a man meeting the description came out, got into the described car, drove about two blocks, and parked. He went into a building, came out carrying a package like those used locally to hold Mason jars of bootleg whiskey, and put the package in the trunk of the car. Defendant drove away and shortly thereafter the officers curbed the car. They identified themselves and asked the defendant to step out and come to the rear of the car, which he did. Then, without any warning of rights, they asked him what he had in the trunk. He replied, "A case of whiskey." The officers were allowed to testify to the question and answer. The court said this was "on the scene" questioning, not custodial in nature. U.S. v. Littlejohn, 260 F. Supp. 278 (1966)

(6) Interrogation in Home or Office

The view of the courts appears to be that interrogation of the accused in his home or office is noncustodial in nature. The police may question him for evidence of his own guilt without going through the warning and waiver procedure. Most of the decisions in this area were handed down in tax cases where Internal Revenue officers obtained from the accused certain statements of guilt, without warning or waiver, which they introduced in court as evidence. Upholding this evidence in a case in which the accused, a dentist, was interviewed in his office, the court said:

> "The language of Miranda makes clear that there must be some form of detention, some type of in custody

situation before the proper constitutional warnings must be given" and that "defendant in the instant case was never 'deprived of his freedom of action in a significant way.'" U. S. v. Hill, 260 F. Supp. 139 (1966). See also U. S. v. Carlson, 260 F. Supp. 423 (1966); U. S. v. Fiore, 258 F. Supp. 435 (1966); U. S. v. Schlinsky, 261 F. Supp. 265 (1966).

(7) Field Interrogation in the Suspect's Home

(a) FBI Agents investigating a bank shortage interviewed the suspect, a woman teller, in her home. They gave her the full Miranda warning. She then made statements against interest. On trial she contended that all evidence of the statements should be excluded on the ground that she did not give the knowing and intelligent waiver of her rights required by the Miranda decision. The court ruled for the government. The Miranda rule does not apply to this interrogation. At the time of the interrogation, the defendant had not been taken into custody and there was not the "slightest indication" that she had been deprived of her freedom of action in any way. Evans v. U. S., 377 F 2d 535 (1967).

(b) Alcohol and Tobacco Tax investigators had general information from reliable informants that defendant was bootlegging. Investigating near the defendant's home, the officers smelled mash and saw mash-encrusted containers and two vehicles apparently on defendant's premises. When the officers saw the defendant, they inquired as to the contents of one truck. No warning of rights was given. Defendant said the truck contained whiskey. The officers searched it and found the whiskey. Defendant was then placed under arrest and was informed of his rights. Defendant claimed that he was improperly convicted because the officers should not have been allowed to testify concerning the contents of the truck. They knew this fact because of his own admission which, he said, violated the Miranda rule. The trial court excluded the admission on that ground, but the appeals court said "These admissions need not have been excluded by the District Court because the doctrine of Miranda applies only to in-custody interrogation and we may consider on appeal evidence in the record which was improperly excluded." (Emphasis added). U. S. v. Agy, 374 F2d 94 (1967)

(8) Field Interrogation in the Suspect's Place of Business

(a) One of three suspects in a Federal tax fraud case was interviewed by an agent of the Internal Revenue Service in her business office at a meeting arranged and attended by her accountant. She made certain oral statements to the agent, who had given her some warning of rights but not the complete warning required by Miranda. The accountant, who had her power of attorney, delivered certain books and records to the agent. Over defense objection, the court ruled that the government could use the evidence. The interrogation was noncustodial; defendant was not in custody or otherwise restrained. U. S. v. Gleason, 265 F. Supp. 880 (1967).

(b) Before return of an indictment against the defendant, agents of the Internal Revenue Service visited the defendant's premises on several occasions and obtained from him statements concerning tax guilt which the government sought to introduce in evidence. The agents had given no warning of rights. The court allowed the statements into evidence, stating that the Miranda rule applies only to situations involving custodial interrogation. U. S. v. Kubik, 266 F. Supp. 501 (1967). See also, U. S. ex rel. Molinas v. Mancusi, 370 F2d 601 (1967), and U. S. v. Schlinsky, 261 F. Supp. 265 (1966); U. S. v. Hill, 260 F. Supp. 139 (1966).

(9) Field Interrogation in a Law Enforcement Office

(a) During the investigation phase of the case, defendant came to an Internal Revenue Service office by invitation to discuss his tax returns. He was told of his right to remain silent and that anything he said might be used against him, but he was not advised of any right to counsel. He made an incriminating admission which the government sought to use against him at trial. Defendant said the admission should be excluded from evidence for violation of the Miranda rule. The court ruled in favor of the government. It said "Miranda was the product of the Supreme Court's concern with the difficulty of protecting persons in the custody of the police from coercive interrogation tactics carried on in secret." The court found no such tactics here. The defendant was free to walk out of the office and there was no suggestion of trickery or fraud. Morgan v. U. S., 377 F2d 507 (1967)

(b) Defendant was discharged from the Air Force in June and returned to his home. In the following August, Air Force investigating officers telephoned defendant and asked him to come to their office concerning an official investigation. Defendant came as invited and was given a warning of rights but was not told of his right to free counsel if unable to pay. He initially denied any knowledge of the thefts under investigation but after about half an hour he admitted his guilt and then gave a written statement. The government sought to use the statement in evidence and the defense objected on the ground that the full Miranda warning was not given. The court agreed that the warning did not meet Miranda requirements but allowed the statement into evidence. The court said ". . . it is perfectly clear that the questioning of the defendant in this case was not custodial interrogation. . . the defendant was under no compulsion to go to the investigators' office and he was free to leave at any time during his stay there. He did leave at the conclusion of the interview, and was not arrested until several months later." U. S. v. Knight, 261 F. Supp. 843 (1966). See also U. S. Appell, 259 F. Supp. 156 (1966), and U. S. v. Gleason, 265 F. Supp. 880 (1967).

(c) The favorable decisions cited above should not obscure the fact that particular caution is necessary if the interrogation of a criminal suspect in a law enforcement office is to be kept noncustodial so that the Miranda warning and waiver procedure need not be followed. The invitation to the office should be handled in such a way that it clearly is an invitation, not a command, order, or arrest. A true invitation can be extended by mail, telephone or friend. The officer can personally contact the suspect and accompany him to the office if he is willing to go. Such invitations have been upheld. Vita v. U. S., 294 F2d 524 (1961), cert. den. 369 U. S. 823; U. S. v. McCarthy, 297 F2d 183 (1961), cert. den. 369 U. S. 850. But unless the officer has some third-party, nonpolice corroboration of the fact of invitation, as where the suspect's employer heard the invitation and the agreement to go, such an invitation risks a later claim by the accused that actually he was under arrest, Seals v. U. S., 325 F2d 1006 (1963), cert. den. 376 U. S. 964, which would make the subsequent questioning custodial in nature and require the Miranda warning and waiver procedure.

(d) Once the invited suspect reaches the law enforcement office, the conditions of the interrogation should be kept as noncustodial as possible. Allow him all available courtesies, such as permission to use the telephone. If the facilities are suitable, conduct the interrogation in some semi-public place such as a desk in the corner of the police department lobby, or in a large room where other desks are occupied by police clerical personnel in the performance of their regular duties. The deeper the suspect is taken into the recesses of the building, the more isolated he becomes from people in general and from familiar surroundings, the more likely it is that the court will find that he was under arrest or so significantly deprived of his freedom of action that formal arrest was only an unimportant technicality. Seals v. U. S., supra; People v. Furnish, Calif., 407 P2d 299 (1965)

(10) Field Interrogation in Other Public or Private Places

(a) Defendant was in a hospital suffering from a gunshot wound. Police officers came and said they wanted to question him about a holdup that occurred several days earlier. Defendant at first made no statement but after a brief period of interrogation, he confessed. The police did not give the Miranda warnings and on that basis the defendant objected to the admission of his statement into evidence. The court held that the Miranda decision does not prohibit the use in evidence of this statement. When the statement was given, the defendant was not in custody and the police had not deprived him of his freedom in any significant way. No police guard was stationed at the hospital room door, and when the questioning ended the police went away. People v. Tanner, New York Supreme Court, November 14, 1966, reported in 35 Law Week 2287.

(b) The courts still will look to the facts of each case. No elaborate explanation is needed to prove that an interview of a business man in his office at high noon by one or two officers is quite different from an interview with a lone and frightened woman by several officers in her home at midnight. In the former case the courts might quite easily hold that a confession, given without warning or waiver, is admissible in evidence. In the latter case they may hold that the woman was under such psychological duress that she was "otherwise deprived of her freedom of action in a significant way" and hence should have been warned just as if she had been in actual custody. Or they may hold that the confession was not voluntary under the circumstances, and inadmissible for that reason.

(c) If an interview for evidence of guilt, without warning or waiver, is to be held in a home or office it should be conducted by an absolute minimum number of officers, without any language or display of force or duress, and at a reasonable hour of normal human activity. If the officer does not intend to arrest on this occasion, advise the suspect, at the outset of the interview, that he is not under arrest and that he may discontinue the interview at any time he desires. Make a record of that advice to show that the interview was noncustodial.

(11) Or Otherwise Deprived of his Freedom of Action in Any Significant Way

(a) The persons who must be advised of the right against self-incrimination, when questioned by the police for evidence of their own guilt, include more than those who have been taken into custody. They also include any person who has been otherwise deprived of his freedom of action in any significant way; that is, persons who are interrogated under circumstances which the law does not consider to be custody but which, nevertheless, tend to exert against the accused the same type of pressure as that found in custodial situations.

(b) None of the early Federal court decisions construing Miranda have interpreted or illustrated the meaning of "otherwise deprived of his freedom of action in any significant way." Yet the officer is required to observe this part of the rule as much as the "in custody" part. Some speculation on the meaning becomes necessary.

(c) The "otherwise deprived" phrase probably was not intended to cover a large number of interrogation situations. It more likely is a "catchall," designed to cover those cases of a marginal nature where it is reasonably clear that the accused was not in the actual physical custody of the law, in the arrest or imprisonment sense, but equally clear that he might just as well have been in custody because the power to control the situation had passed completely out of his hands and into the hands of the police.

(d) When the accused was (1) subjected to lengthy interrogation, (2) concerning his own guilt, (3) in an interrogation room inside the police station, (4) without friend or counsel present, he was effectively deprived of his freedom of action in a significant way even though he was not actually in police custody at the time, in the arrest sense. The same result could be expected if the accused were invited into a police car and then driven to "lonely and isolated places" for questioning. See Ward v. Texas, 316 U. S. 547 (1942)

In each such case the accused appears to be in what amounts to "custodial surroundings," or an "isolated setting" or a "government established atmosphere," of which the Supreme Court spoke in Miranda. The result might well be otherwise, however, if the interrogation took place at a desk in the public lobby of the police station or in a police car parked along a busy street, and especially so if the interrogation leading to the confession was of short duration and the suspect was specifically advised that he was free to go and not under arrest.

(e) The totality of circumstances surrounding the confession will be extremely important in these "otherwise deprived of his freedom of action" cases. "Custody" is relatively easy to define and find, but "otherwise deprived of his freedom of action in any significant way" is not. When a court finds that a statement given by the defendant and challenged by him in court was given under circumstances which do not meet the definition of "custody" but do seem to have put police pressure on him, it will look to all the circumstances to see whether the accused was "otherwise deprived. . ." Postal inspectors suspected that the accused was using the mails for false insurance claims. An inspector appeared at the moment when the accused took certain mail from a box held in an assumed name in the post office, asked for the mail and got it. The inspector then asked the accused to accompany him to a nearby office in the building, where the inspector formally introduced himself and another inspector. The accused was told of a right to silence and a right to counsel, apparently not the full warning required by Miranda. He called his attorney but the latter was not in the office. The accused then talked briefly with the inspectors and made certain admissions. He refused to initial the envelopes taken from the box. He then left the office. The court refused to suppress an inspector's testimony to the statements, saying that "defendant Appell was at no time in custody or otherwise deprived of his freedom of action in any significant way." U. S. v. Appell, 259 F. Supp. 156 (1966).

(f) The "otherwise deprived of his freedom of action" language is a warning to police officers and prosecutors that the required warning of rights for custodial situations is a matter of substance, not technicalities. It is a reminder that if officers attempt to evade the necessity of giving the warning by using some interview technique in which they do not take the accused into custody, but do place him otherwise under the same psychological pressure which would be found in a custodial situation, the resulting statement given without warning will be excluded from evidence just as if it had been given without warning while in actual custody. No "short-cut" or deliberate evasion of the warning rule will be allowed. Whatever the circumstances surrounding any interrogation made for the purpose of obtaining an incriminating statement, if it sensibly appears that the pressure against the accused is similar to that which he would experience in actual custody the warnings should be given just as if he were in custody.

(g) Another observation deserves mention. Officers accustomed to interrogating under the terms of the *Escobedo* decision will still use the phrases "investigatory stage" and "accusatory stage" in discussing what must be done to comply with the *Miranda* decision. Their view, apparently, is that even under *Miranda* the warning and waiver procedure must be followed once the case reaches the "accusatory stage." We suggest that this is not true. The *Miranda* decision does not add to the *Escobedo* decision; it replaces the *Escobedo* decision. *Miranda* is now the controlling decision, and it does not in any case require the warning and waiver procedure until the accused is to be questioned for evidence of his own guilt and ". . . has been taken into custody or otherwise deprived of his freedom of action in any significant way" - arrested or placed in a custodial condition which is the substantial equivalent of arrest. So long as he is *not* placed in such a condition, the officers may question him without warning and waiver, and use the statement in evidence, despite the fact that at the time of questioning they already had enough evidence against him to make probable cause for arrest and thus put the case in the "accusatory stage" if the *Escobedo* formula were to be followed. *Miranda* does not require any attention to the "investigatory" and "accusatory" stages. What *Miranda* does require is close attention to how, when and where the officers approach the accused - the physical and psychological conditions under which he is questioned for evidence of his own guilt. So long as he is questioned by the officers fairly and openly, and under conditions such that he can *retain control* of himself and what he says and does, no warnings are necessary. But once he actually is arrested for the offense, or otherwise place in some similar condition such that he no longer can feel free to walk out or away, or to tell the officers to leave him alone, he has *lost control* of himself and the situation to the officers and he must then be warned as *Miranda* requires.

73. TO WHOM WARNINGS NEED NOT BE GIVEN

73.1 THE LEGAL RULE IN GENERAL

In defining what confessions or admissions of guilt are admissible without prior warning and waiver, the Supreme Court said "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding . . . any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. . . there is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

73.2 A PERSON COMMITTING A CRIME AT THE MOMENT

An officer, informant or other witness can testify to incriminating statements made by the accused while he was committing the crime without showing any prior warning to the accused of his constitutional rights. For example, an FBI agent working "under cover" and posing as a buyer for stolen securities met with several of the accused in a hotel room to negotiate the deal. The agent testified in court to statements made by the defendants at that time. The defense claimed that the agent violated the defendants' Sixth Amendment right to counsel by not advising them of his true identity before engaging in the conversation in the hotel room. The court rejected this claim. U. S. v. Edwards, 366 F2d 853 (1966). In a legally similar case, Federal narcotics agents arranged with a co-operative informant for the latter to make a "buy" from the defendant in the informant's car and to place an agent in the trunk to overhear the conversation. The plan worked. The defendant claimed, as in the FBI case above, a violation of his right to counsel and on that ground objected to the trial testimony of the agent and the informant. The court ruled against the defendant, stating specifically that Miranda provides no authority for such an argument, and further, that "One is not entitled to counsel while he is committing his crime." Garcia v. U. S., 364 F2d 306 (1966). See also Rogers v. U. S., 369 F2d 944 (1966); Grier v. U. S., 345 F2d 523 (1965); Battaglia v. U. S., 349 F2d 556 (1965), cert. den. 382 U. S. 955.

73.3 PERSONS WHO VOLUNTEER STATEMENTS

(1) One of the general rules stated in the Miranda decision is that an officer can testify in court to a statement volunteered to him by the accused despite the fact that the accused volunteered the statement in a custodial type of place such as a police station and was not given any warning of constitutional rights before he volunteered the statement. For example, suspect A, much to the surprise of everyone, comes into the police station lobby of his own free will, walks up to Desk Sergeant B and says, "I'm the guy who killed that man out behind

the gas works last Thursday." The sergeant can testify to that statement in court. The Miranda decision lays the general rule down as follows:

> "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

But the rule is not absolute. It is qualified in the following language:

> "The mere fact that he may have answered some questions or *volunteered some statements* on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (emphasis added)

(2) What is a volunteered statement? A volunteered statement is one which originates with the desire of that person himself to speak, without any pressure or influence other than that which he feels within himself. The court decisions show some good examples. One man shot another, fled the scene, found an officer and told the officer that he had just shot a man. Bailey v. U. S., 328 F2d 542 (1964). A defendant who had been arrested, released on bond, and indicted met by chance with a Federal Bureau of Narcotics agent working on the case and made an admission of guilt to that agent in a conversation which the defendant started and in which the agent asked him no questions at all. U. S. v. Accardi, 342 F2d 697 (1965). A man was arrested on the highway and placed in a police car. He then volunteered a confession of guilt. U. S. v. Duke, 369 F2d 355 (1966). In each of the three cases cited here, the officer was allowed to testify to the confession despite the fact that no prior warning had been given. See also Perry v. U. S., 347 F2d 813 (1964); Golliher v. U. S., 362 F2d 594 (1966). Unless and until the Supreme Court of the United States or some other court of authority in your jurisdiction rules to the contrary, you should assume that the officer to whom any person volunteers a statement may, without warning of rights, ask any and all clarifying questions up to that point where the person confessing signifies in some way that he does not wish to continue.

(3) Does a volunteered statement end at the moment when the officer asks his first question to obtain more details, or not until the accused indicates in some way that he does not wish to continue?

(4) If a person volunteers a statement in a police station or other place of a custodial nature may the officer ask, without warning of rights, as many clarifying questions as when the statement is volunteered in a noncustodial place? Remember that under the minimum interpretation of Miranda explained earlier, the warnings must be given before any

questioning for evidence of guilt under custodial conditions, but they need not be given for the same kind of interrogation under noncustodial conditions. Assuming this interpretation to be correct, when a person volunteers a statement to an officer in his own home or office, or on a public street corner, the officer may ask - without warning of rights - as many detailing questions as he wishes until that point comes when the confessor indicates in any way that he does not wish to speak further. The conditions are noncustodial and Miranda does not apply.

(5) May a prisoner in a jail or penitentiary, or free on bond, who has counsel retained or assigned, volunteer an admissible statement without the presence or consent of his counsel? The First Amendment right of the accused to speak his mind is as great as that of anyone else. See Jones v. U.S., 342 F2d 863, 879 (1964). He does not lose it by going to jail, or by retaining a lawyer or having a lawyer assigned to him. He has the right to discharge the lawyer or to disregard the lawyer's advice. Once the accused has been made aware of his rights in this proceeding, he is free to volunteer a confession or admission of guilt, and what he volunteers is admissible in evidence. This is true even when he is in custody, under indictment, has a lawyer who has told him not to talk, and the lawyer is not present when the statement is volunteered and has not consented to such volunteering. For example, in one case the accused had been arrested and given a hearing and was assigned counsel who told him "not to make any statements to anybody under any circumstances." Thereafter, and while still in jail, he called for the District Attorney and a police sergeant and told them that " he wanted to make a clear breast of the whole thing." At that time the District Attorney reminded the accused by asking, "Do you know that you have certain constitutional rights and are not compelled to say anything?" The accused answered, "Yes." He was reminded that he had an attorney and he replied, "I don't need an attorney. I know what is best." The accused then gave a signed statement, the use of which in evidence was upheld. Comm. of Pa. ex rel. Craig v. Maroney, 230 F. Supp. 391 (1964), aff. 352 F2d 30, cert. den. 384 U. S. 1019. See also Accardi v. U. S., 342 F2d 697 (1965), cert. den. 382 U. S. 954; U. S. ex rel. Glinton v. Denno, 339 F2d 872 (1964), cert. den. 381 U. S. 929. As one court said of one of these situations, "We perceive no incompatibility with either the letter or the spirit of the Fifth or Sixth Amendment. . . if a defendant, duly cautioned by his attorney against speaking to investigating officers after he has been released from custody, disregards the attorney's admonitions and speaks willingly when he is free to remain silent." U. S. v. Bellamy, 326 F2d 389 (1964).

(6) At what other times in the criminal process may a person volunteer a confession or admission of guilt? Briefly, a confession or admission of guilt may be volunteered at any time in the criminal process, and the wise officer will be always alert to that possibility. A confession or admission of guilt may be volunteered:

(a) Immediately before, during, or immediately after the arrest process U.S. v. Cole, 311 F2d 500 (1963), cert. den. 372 U.S. 967; Ward v. Comm. (Va.), 138 SE2d 293 (1963); Morford v. State (Nev.), 395 F2d 861 (1964).

(b) By apology to the victim of the crime while in police custody. Copeland v. U.S., 343 F2d 237 (1965); Katz v. Peyton, 232 F. Supp. 131 (1964), aff. 334 F2d 77, cert. den. 379 U.S. 915, reh. den. 379 U.S. 984.

(c) While speaking to other persons, in the presence of the police, as a hospital patient after arrest. Dixon v. Bailey, 246 F. Supp. 100 (1965)

(d) In the police station or jail after arrest. Comm. of Pa. ex rel. Craig v. Maroney, 230 F. Supp. 391 (1964), aff. 352 F2d 30, cert. den. 384 U.S. 1019; State v. Stinson (N.C.), 139 SE2d 558 (1965); Long v. U.S., 338 F2d 549 (1964).

(e) While being transported by a custodial official, such as the United States Marshal, from the jail to the office of the attorney for the accused. U.S. v. Gardner, 347 (F2d 405 (1965), cert. den. 382 U.S. 1015.

(f) In a chance meeting with an officer while out on bond after indictment. Accardi v. U.S., 342 F2d 697 (1965), cert. den. 382 U.S. 954.

The above list is not intended to be complete. Its only purpose is to show the wide variety of circumstances under which a volunteered confession or admission of guilt may be obtained. It has been held that even a volunteered statement made while the accused was obviously drunk is not admissible in evidence. Unsworth v. Gladden, 261 F. Supp. 897 (1966).

73.4 PERSONS QUESTIONED AS WITNESSES ONLY

(1) Persons questioned as witnesses only need not be warned of the constitutional right against self-incrimination. They are not being asked to incriminate themselves and they usually are not in police custody when questioned. Should it happen, however, that questioning of this type takes such a turn that the person who was thought to be a witness only - not involved in the offense - begins to disclose evidence of his own guilt of a crime, the warnings required by Miranda should be given immediately and before any additional questions are asked, if it is intended to use this information against him in court and if he is in custody while being questioned.

(2) Even a known criminal in police custody for a specific crime may be questioned as a witness only. See, for example, U.S. ex rel. Caserino v. Denno, 259 F. Supp. 784 (1966). For another example, suppose the officers have warrants for three bank robbers. They have arrested one of the three, the least important of the group. It may be their judgment,

agreed to by the prosecutor, that because of the minor part played in the robbery by the man in custody it would be better to not prosecute him at all, provided that he will be a witness against the other two. In such a case, the man in custody will be questioned as a witness only and the use of the information obtained from him, against the other two, does not require that he be warned of his rights. The Supreme Court appears to have made this point clear in both Massiah v. U.S., 377 U.S. 201 (1964) and in Miranda. In Massiah, the court said, in part, that:

> "All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."

In Miranda, the Court said, in part, that:

> "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (emphasis added)

(3) In other words, if A is questioned under circumstances which require that he be warned of his constitutional rights, failure to warn him will make his statement of guilt inadmissible against him but it will not prevent his evidence from being used by the prosecution against B, C or another person. If whatever A says is to be used against someone else, and not against himself, he may be questioned without warning of rights. For the purposes of this interrogation, he is a witness only.

73.5 PERSONS QUESTIONED FOR PERSONAL HISTORY DATA ONLY

(1) In penitentiaries and many larger jails there is a rule that any person incarcerated must be questioned for personal history data. The purpose is to discover all information which might be pertinent to the jailer's problem - the home address and relatives of the inmate, the state of his health, etc. This questioning may be done by a jail employee, full-time or part-time, or by some other person who has no connection whatsoever with the investigation of the offense with which the inmate is charged and who has no intention of obtaining an admission or confession of guilt in the case. See Killough v. U.S., 336 F2d 929 (1964); U.S. v. Mullings, 364 F2d 173 (1966).

(2) As a general rule, no warning of rights need be given in these interviews. The suspect is not being asked to incriminate himself. The problem arises from the fact that the suspect sometimes, as in Killough and Mullings, makes a statement or gives information which amounts to an admission or confession of guilt in the case. This information is reported by the interviewer and the prosecution wishes to use it at trial. Can it be so used when given without warning of rights?

(3) The court in Mullings held that the admission of guilt can not be used. The decision seems sound. An inmate questioned for personal history data only should be encouraged to speak freely so that all pertinent data may be obtained. He likely will speak most freely when not under warning and should not be prejudiced thereby. If it is intended that the information will be used against him, the interviewer should first give the Miranda warnings.

73.6 PERSONS ALREADY AWARE OF THEIR RIGHTS

(1) Some suspects interrogated by law enforcement officers are aware of both their right to say nothing to the officers and their right to consult with an attorney, and quick to admit or volunteer such knowledge. For example, in a case tried before the Miranda decision was announced, the suspect said to the FBI Agent, "I know I don't have to make a statement and I can have an attorney." Moreover, when he took the stand in his own defense he confirmed the fact that he had made such a statement. Kear v. U.S., 369 F2d 78 (1966). Is it necessary to warn such a suspect of his rights?

(2) The Miranda decision appears to require that the warning of rights be given to anyone and everyone being questioned concerning his own guilt while in custodial surroundings. No exceptions are allowed. On this point, the Court said as follows:

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessment of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."

(3) The quoted language may still allow an exception for the case like Kear, cited above, where the accused openly admits to knowledge of his rights and the fact of the admission is proven in court, by his own testimony or otherwise. It is suggested here, however, that the officer not gamble on such an exception. That the exception exists is not at all clear. Moreover, the accused who admits knowledge of his rights to the officers may later take the stand in his own defense to deny such an admission. It would be the better policy to give the warning to any person interrogated for evidence of his guilt while in custodial surroundings, regardless of any prior knowledge of right which he may admit or display.

(4) Is it necessary for the interrogating officer to advise an obviously well-to-do suspect of a right to free counsel if unable to pay? This is one of the four warnings which the Court said should be given to everyone. One Federal district court, however, speaking in a case in which the defendant was a dentist, stated that in view of the high income level of dentists, failure to warn a dentist of the right to free counsel if unable to pay would be "harmless error" - it would not affect the admissibility of the confession. U.S. v. Hecht, 259 F. Supp. 581 (1966)

(5) The interrogating officer can not be certain that the suspect is aware of his rights even after the suspect has privately conferred with a lawyer called to the place of interview, or with whom the suspect has talked by telephone. The discussion may have been limited to preliminary negotiations to decide whether the lawyer would take the case.

(6) In some cases, the lawyer will openly advise the accused of his rights, in the presence of the officers. In such a case, it should be unnecessary for the officers to give their own warning. They should, however, make a note of the warning given by the lawyer, the words, time, place, persons present, etc.

73.7 PERSONS ASKED FOR NONTESTIMONIAL EVIDENCE

(1) The self-incrimination clause of the Fifth Amendment, on which the Miranda rule is based, protects the accused against compulsion to give oral or written testimony as to his guilt. It does not protect him from giving nontestimonial evidence against himself such as he might provide by appearing in a lineup for identification or by giving a sample of his handwriting. For example, in Schmerber v. California, 384 U.S. 757 (1966), decided one week after Miranda, the petitioner was arrested in a hospital while being treated for injuries suffered in an accident to an automobile which he was driving. At the direction of a police officer, a physician took a blood sample which was found to indicate intoxication. This evidence was used against petitioner at trial. The petitioner had objected, on advice of counsel, to the taking of the blood sample. The action of the officer and the physician was upheld, however, by the Supreme Court of the United States against petitioner's contention that the taking of the sample violated his Fifth Amendment right against self-incrimination. In upholding the action of the officer and the physician, the majority of the Supreme Court stated that the Fifth Amendment privilege against self-incrimination, "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." In other words, the officer may legally obtain evidence from the accused in these and similar ways without first giving the accused the Miranda warnings or obtaining a waiver of the rights covered by the Miranda decision.

(2) As indicated in the Schmerber decision above, it has been held that the Fifth Amendment privilege against self-incrimination is not violated by obtaining from the accused, without warning, samples of his handwriting, U.S. v. Russell, 260 F. Supp. 265 (1966); State v. Fisher (Oregon), 419

P2d 216 (1966), directing the accused to speak for voice identification, U.S. v. Russell, supra, and taking motion pictures of a drunk in the police station, Lanford v. People (Colorado), 409 P2d 829 (1966). As stated in the Russell decision above, the accused may be forced to perform some physical act such as putting on eye glasses, submitting to a physical examination, or having a handkerchief put over his face to simulate the appearance of the robber.

73.8 PERSON CONFESSING OR ADMITTING GUILT TO NEWSPAPER REPORTER, CELLMATE, OR OTHER THIRD PARTY

(1) Sometimes a person in the custody of the law will confess or admit his guilt to some third party who is not a part of the law enforcement machinery. The statement may be made to a newsman, Evalt v. U.S., 359 F2d 534 (1966), a cellmate, Stowers V. U.S., 351 F2d 301 (1965), someone on the plane or train on which the accused is being brought back for trial, People v. Gunner, 15 NY2d 226 (1965), or any other person. The statement may be volunteered, or it may be made in response to questions asked. Assuming that there was no warning of rights, does the Miranda rule prevent the government from using the testimony of the person to whom the statement was made?

(2) If the statement was volunteered, the person to whom it was made may testify. The result is the same if the statement was made in response to questions asked, provided that the person to whom the statement was made was not acting as a police informant at the time. See Stowers v. U.S., supra. If the person asking the questions was a government informant for that purpose the case is one of the officers trying to do indirectly what they are forbidden to do directly - question a person in custody for evidence of his own guilt without warning of rights - and the evidence is inadmissible. Massiah v. U.S., 377 U.S. 201 (1964).

(3) At least until more decisions on the point are available, Federal officers should assume that no confession or admission of guilt given to a news reporter by a person in custody, without prior warning of rights, is admissible. In Evalt v. U.S., supra, the Federal court used its supervisory power over the administration of criminal justice in the Federal courts to rule that such a confession is inadmissible. The court's reason was that "Newspaper interviews with suspects . . . are fraught with the gravest danger to the administration of justice. They create the probability . . . where . . . they result in the publication of a confession, that the defendant will be unable to get a fair trial."

73.9 MISDEMEANORS - DOES THE MIRANDA RULE APPLY?

(1) The Supreme Court did not say in the Miranda opinion whether the new rule of warning and waiver applies to all criminal offenses or to felonies only. More specifically, does it apply to misdemeanors?

(2) The question is complicated by the fact that the distinction

between felonies and misdemeanors is not simply one of important and unimportant offenses. Some states have large numbers of criminal offenses carrying substantial jail or penitentiary offenses which are classified in the statutes as misdemeanors. Some of these offenses carry heavier penalties than some felonies. Any distinction between them for warning and waiver purposes would be totally arbitrary, without any basis either in good sense or the theory of constitutional law. It must be assumed that the Miranda rule applies at least to the more serious misdemeanors as well as to all felonies. See Creighton v. N.C., 257 F. Supp. 806 (1966); Arbo v. Hegstrom, 261 F. Supp. 397 (1966).

74. THE WARNINGS REQUIRED

The warnings required by the Miranda decision are essentially those which were given by the FBI before the decision was handed down. The Court believes that these warnings can be given by all officers. At one point in the opinion it said, "The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience." The warning comes in four distinct parts, as follows:

(1) The person "must be informed in clear and unequivocal terms that he has the right to remain silent."

(2) "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court."

(3) "Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . ." The words "consult with a lawyer" mean a right to consult before interrogation.

(4) "It is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him."

74.1 EACH PART OF THE WARNING IS REQUIRED

(1) In speaking of the right to counsel, the Court said, "As with the warning of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation . . . unless and until such warnings are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

(2) Although the majority of the Court made it clear that each of the four warnings shown above must be given, some doubt has been expressed on the necessity of advising a "well-heeled" accused that he is entitled to free counsel if unable to pay. One Federal court has stated that in view of the high income level of dentists, failure to advise a dentist of the

right to free counsel if unable to pay would be "harmless error" which would not affect the admissibility of the confession. *U.S. v. Hecht*, 259 F. Supp. 581 (1966). This may be true, but how can the officer know for sure that the accused is financially solvent? It is better to give the full warning than to gamble on an assumed fact which may prove to be untrue.

74.2 WARNINGS REQUIRED FOR ALL STATEMENTS

The warnings must be given and a waiver obtained to introduce in evidence any statement obtained from the accused, no matter whether the statement tends to incriminate him or exonerate him. As the Court said, "No distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word. . ."

74.3 FAILURE TO GIVE THE WARNING

(1) Failure to give the warning results in exclusion of the confession or admission - or other statement - from evidence. To what extent this exclusionary rule also requires exclusion from evidence of things found as a result of the confession, such as the gun used in the murder, is not clear. As Mr. Justice White observed in his dissent to the *Miranda* decision, the question of what happens to derivative evidence (other evidence derived, obtained or located as a result of the confession) is left undecided.

(2) It is suggested here that the Court will exclude all other evidence obtained as a *direct* result of the statement. For example, if the accused confesses under interrogation and without proper warning, and states in his confession that the murder weapon may be found in such and such a place, and it appears that without the confession the police would not have found the weapon, the weapon must be excluded from evidence. *Wong Sun v. U.S.*, 371 U.S. 471 (1963). But if the additional evidence is connected only *indirectly* with the statement it can be used. For example, suppose that during the interrogation without proper warning the police learn, from the accused, of the identity of a possible witness. They interview the witness. He locates the murder weapon for them and agrees to testify. Both the weapon and his testimony should be admissible. See *Edwards v. U.S.*, 330 F2d 849 (1964); *Smith v. U.S.*, 324 F2d 879 (1963).

75. WHEN THE WARNING MUST BE GIVEN

75.1 THE LEGAL FORMULA

(1) The *Miranda* opinion says that "Prior to any questioning, the person must be warned . . . At the outset, if a person in custody is to be subjected to interrogation, he must first be informed . . . ."

(2) The legal formula is not entirely clear. It probably does not mean that the officer must give the warning before asking questions of an identification nature only - questions of name, age, residence, relatives, employment, identification, etc. - the type of question properly asked during the booking process. It does mean that the warning is to be given before asking the person any questions concerning his own guilt.

75.2 NOT AT THE MOMENT OF ARREST

(1) Certainly there is no requirement that the warning be given at the moment of arrest. To require that it be given at that time would unjustifiably interfere with other and more urgent duties with which the officer often is confronted, such as physically subduing an accused who fights the arrest, Mont v. U.S., 306 F2d 412 (1962), cert. den. 371 U.S. 935; grabbing some object of uncertain identity which may be evidence threatened with destruction, Abel v. U.S., 362 U.S. 217 (1960); securing a weapon with which the officer may be attacked or killed, U. S. ex rel. Robinson v. Fay, 239 F. Supp. 132 (1965); or preventing the prisoner from committing suicide, Palakiko v. Hawaii, 188 F2d 54 (1951). At the moment of arrest the officer's immediate right and duty is to first protect himself against harm, deprive the prisoner of means of escape, and prevent the destruction of evidence. U.S. v. Rabinowitz, 339 U.S. 56, 72 (1950); Abel v. U.S., supra, at 236.

(2) Once the arrest has been securely made, the officers may give the Miranda warnings if they so desire. There is no harm in doing so at that time and it may even prove wise to do so should the accused make some oral confession or admission of guilt, shortly after arrest, which he later claims to be inadmissible. See U.S. v. Konigsberg, 336 F2d 844 (1964), cert den. 379 U.S. 930, 933. The Miranda decision does not require that the warnings be given, however, until immediately prior to interrogation initiated by the police for evidence of guilt.

75.3 IN POLICE STATION OR OFFICE

The Miranda warnings are best given in the police station or office. It is here that the officer has the best opportunity to use the formal, printed warning, the tape recorder, and other witnesses by use of which he best can prove in court that the warnings were actually and properly given.

75.4 HOW LONG THE WARNING LASTS - SUBSEQUENT INTERROGATION

(1) The Miranda decision does not suggest how long a proper warning, once given, should last in the mind of the person being interrogated. It is obvious that if the person is warned now, and his waiver obtained, he lawfully may be questioned five minutes later without repeating the warning. It is equally obvious that if he is questioned a month later, he should first be warned again at that time. The questionable area is somewhere between these two extremes.

(2) EDITOR'S NOTE: In People v. Hill, 233 N.E. 2d 367 (Ill. Supreme Ct., 1968), the defendant was arrested the night his gang allegedly

shot another **youth**. He was taken at 3:00 a.m. to the precinct station for questioning. He was questioned three times over a period of about three hours. He was subjected to actual interrogation for a total of one hour.

The court held:

(a) Hill was provided with full Miranda warnings before the questioning, but was not warned thereafter, although the questioning was halted and then resumed periodically * * * * * *

(b) We turn to the question whether the defendant's statement was a voluntary response, or an involuntary by product of a coercive atmosphere. In cases such as this, where it is undisputed that Miranda warnings have been adquately given at the inception of the questioning, we hold that it is not necessary to repeat the warnings at the beginning of each successive interview. "To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing a meaningful set of procedural safeguards envisioned by Miranda."

(c) The defendant was subjected to a relatively short period of questioning; that is an important factor here. Also, Hill was no stranger to police investigations, and no other circumstances were shown which would render him especially susceptible to subtle psychological techniques.

(d) "The factors present here, of interrogations for relatively short periods of time unaccompanied by any semblance of coercion, have been deemed sufficient to support a finding of the voluntariness of a confession made to law enforcement authorities where the Miranda rights have been clearly explained. (Alexander v. United States, (8th Cir.) 380 F. 2d 33.) We also find it significant that despite Hill's original disavowal of any involvement in the murder, he in no way indicated to Detective Serafini 'any disinclination to submit to further questioning' (Tucker v. U. S. (8th Cir.) 375 F 2d 363, 369), and the circumstances of a defendant's freely answering certain questions posed by police has been held sufficient to rebut the normal presumption against waiver of constitutional rights."

76. BY WHOM THE WARNING IS GIVEN

76.1 THE LEGAL FORMULA

The Miranda decision does not seem to require that the warning be given by the officers themselves. It says that "the person must be warned" or that the police must make his rights "known to him". This language seems to leave room for the warning to be given by persons other than the officers.

76.2 BY THE MAGISTRATE

If the person taken into custody is brought promptly before a magistrate (as Federal law and the laws of some states require), and is there properly warned of his rights, this warning should hold for any police interrogation concerning that crime and occurring within a reasonable period thereafter, such as the same day.

76.3 BY COUNSEL FOR THE ACCUSED

(1) If counsel for the accused is present during the interrogation, or shortly before, and warns the accused of his rights, this warning should be sufficient. There should then be no need for the officers to give their own warning prior to interrogation for evidence of guilt.

(2) Doubt may arise in some cases, however, because the warning which the officers hear counsel give to the accused is not precisely the four-point warning which the Court outlined in Miranda.

(3) There may be doubt in other cases because the accused and counsel conferred in private, as they have a right to do, and the officers do not know that any warning was given. The conversation may have been limited to whether the lawyer would take the case, and a decision that he would not. In a situation of this kind the interrogating officer should pointedly ask the accused if (a) the lawyer said he would take the case and (b) the lawyer advised the accused of his rights. If the answer to both questions is in the affirmative, the accused has been warned and the interrogation may proceed without additional warning. In the expressed views of the courts, ". . . one who has conferred with counsel presumably knows of his rights to remain silent and that anything he says may be used against him." Williams v. Anderson, 245 F. Supp. 185 (1965); "It is inconceivable that, having conferred with his own attorney prior to the interrogation, he was uninformed with respect to his right to remain silent." Wade v. Yeager, 245 F. Supp. 67 (1965); an accused who has engaged a lawyer and conferred with him "presumably has been advised of his rights by his own attorney." Beavers v. U.S., 351 F2d 507 (1965).

76.4 BY THE OFFICERS

Because of the way in which criminal interrogations develop, in most cases the officers will be the only persons present who are capable of giving the warnings.

77. HOW THE WARNING IS GIVEN

77.1 THE LEGAL FORMULA

The Miranda decision does not require that the warning be given in any particular manner other than that it must be given and that it must be clear and intelligible. Use language that is simple and direct.

77.2 ORALLY FROM PREPARED TEXT

Some law enforcement agencies are using a combined oral-written warning. Each officer carries on his person a card on which the required warnings appear. The warnings are read to the accused by the officer and the officer retains the card for use in testimony if asked on the stand to state what warnings were given. In another version of this practice, the officer hands the accused a copy of the card and allows him to keep it.

78. THE WAIVER

78.1 PREREQUISITES

(1) **The Legal Formula**

(a) The warning of rights must be followed by a waiver of those rights before interrogation can proceed to an admissible confession or admission of guilt. After discussing the several rights of which the person must be warned, the Court said in Miranda that "the defendant may waive . . . these rights, provided the waiver is made voluntarily, knowingly and intelligently . . . . Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Emphasis added). At another point in the opinion the Court said, "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." (Emphasis added).

(b) In emphasizing the point that the waiver must be specifically made, the Court said that "his failure to ask for a lawyer does not constitute a waiver" and "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." This language is strong evidence that the only acceptable method for obtaining a waiver after the required warnings have been given is for the officer to ask the accused the direct question whether he is now willing to discuss the case without first consulting with counsel. If the accused then states that he is willing to do so, a specific waiver has been obtained and there remains only the problem of proving that waiver in court, which is discussed later. But if the accused replies in the negative, or does not make up his mind, or simply fails to answer, there is no waiver. This means, quite simply, that questioning of the accused concerning his own guilt should immediately be discontinued.

(2) The Waiver Must be Completely Voluntary

(a) A statement given by the accused during questioning for evidence of his guilt while in custody or otherwise deprived of his freedom of action in any significant way is not admissible in evidence unless his waiver, specifically made, was completely voluntary. Coercion of any kind used to obtain the waiver calls for a judicial ruling that the waiver was not voluntarily given. On this point the Court said:

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights . . . . Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (Emphasis added)

(b) As to threats, trickery or cajolery used to obtain a waiver, this type of coercion could come in many forms and not all of them can be illustrated here. Threats are illustrated by Lynumn v. Illinois, 373 U.S. 528 (1963), where the interrogating officers allegedly told the woman arrested and questioned for a narcotics violation that unless she cooperated with them her children would be taken away from her even after she was released from prison. See also Rogers v. Richmond, 365 U.S. 534 (1961). Trickery is illustrated by Turner v. Pennsylvania, 338 U.S. 62 (1949), where the officers allegedly told the accused falsely that other suspects in the case had "opened up" on him and placed the blame on him. See also Leyra v. Denno, 374 U.S. 556 (1954). Cajolery is persuasion of sorts, illustrated by Spano v. New York, 360 U.S. 315 (1959), where the officers allegedly sent a student police officer, a boyhood friend of the accused, in to see the accused several times to plead with him that he should confess lest the student officer himself be placed in a bad light.

(3) Failure to Obtain a Waiver

Failure to obtain a waiver makes the warnings useless; a statement given after warnings but without proof of waiver is not admissible in evidence. As the Court said in Miranda, ". . . unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

(4) Waiver Must be Continuous

(a) As indicated in the quotation from the Miranda opinion shown earlier, the accused who waives his rights at the beginning of the interrogation has a constitutional right to change his mind at any time. If he changes his mind part way through the interrogation and refuses to say more without an attorney, the interrogation must cease; he has revoked his waiver and anything he says from this point on is not admissible in evidence. The practical result is that in some cases the accused will get part way through a confession and will then revoke his waiver given previously. That which he already has said is admissible because it was given under a waiver, provided the officers can document the fact of warning and waiver and show the part of the confession given before the waiver was revoked. In all such cases, an interview log or complete set of interview notes will show the exact point in the confession at which the waiver was revoked by the accused. It will be of value in getting into evidence that part of the confession already made.

(b) Note that the accused can change his mind either way. A woman arrested for a Federal offense was brought before the United States Commissioner and informed of her rights. She said that either her mother or her father would get an attorney for her, thus indicating that she wanted to see an attorney first. Immediately thereafter, however, she changed her mind and gave a confession. Use of the confession in evidence was upheld. Narro v. U.S., 370 F2d 329 (1966).

(c) Written or printed - Many law enforcement agencies are now using a printed waiver form. The waiver is printed immediately below the warning of rights, and below the waiver is the place where the accused signs his signature for both and the place where the witnesses' signatures and titles are recorded. If a form of this kind is used and the accused is willing to make a statement, the statement may be added immediately below the signature on the waiver, without further warning. A written and signed waiver of constitutional rights is better than an oral waiver. Pool v. U.S., 344 F2d 943 (1965)

(d) In using a printed or written waiver, if the accused waives his rights orally but refuses to sign, the exact words which he uses to express the waiver of his right to silence and his right to counsel should be written in the blank space on the form by the officers and then witnessed by them. This is the best proof, under the circumstances, of the fact of this waiver. It is admissible in court. Wong Sun v. U.S., 371 U.S. 471 (1963).

(e) Revocation of waiver previously given - As indicated earlier, the accused who waives his right to silence and right to counsel has a right to change his mind at any time and refuse to discuss anything further, except on his own terms, such as the presence of counsel, etc. It sometimes occurs that a person confessing a crime goes part way through his confession and then decides to say nothing more. If this person has been properly warned and has given a waiver of rights, all that he said before changing his mind and electing to remain silent is admissible. The interviewing officers should keep an interview log or other form of notes which will show exactly the time, and the exact place in the confession, where the accused changed his mind. This will help to introduce in evidence that part of the confession already given.

78.2 WAIVER IMPOSSIBLE - ACCUSED INCAPABLE OF WAIVING

(1) In General - As the Court made clear in Miranda, a waiver will not stand up in court unless it was made "voluntarily, knowingly, and intelligently." This means that the accused must be physically capable of hearing the warnings, mentally capable of understanding that he has these rights, and of such a condition in general that he is capable of making up his own mind on whether he wants to exercise those rights or surrender them at this time.

(2) Young Children

(a) Some persons who are children in the eyes of the law are well aware of their rights. For example, a 17 year-old boy charged with first-degree murder told the interrogating officer his name and address and then added, "I don't have to tell you anything else, you can go to hell." Harrison v. U.S., 359 F2d 214, 218 (1965). Another, however, can be of such tender years and so little experience that he is incapable of comprehending the full meaning of constitutional rights, and even doubtful that he has such rights when in the presence or custody of police officers. The law does not set any precise age below which the child is incapable of waiving and above which he is capable. Age is a factor, but so are experience, maturity, level of intelligence, education, and the facts on how the child was interrogated and otherwise treated by the police. Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962). A Federal court said of a 16 year-old defendant that "his age alone permits an inference that the waiver was not intelligent." U.S. ex rel. Brown v. Fay, 242 F. Supp. 273 (1965). See also U.S. v. Myers, 240 F. Supp. 39 (1965); Roberts v. Beto, 245 F. Supp. 235 (1965).

(b) An officer who has any reasonable doubt concerning the capacity of a minor to understand his rights and to make an intelligent waiver of them should look for help in handling the warning and waiver process. He may take the minor immediately before a magistrate and ask that official to give the warning and determine the waiver, and make a record of it. Or he may call in the parent, guardian, lawyer or some other adult capable of counseling the minor. If such a person cannot be found, and the necessities of the case require immediate interrogation, give the warning and obtain the waiver (if the accused is willing to give it) in the most positive manner possible under the circumstances.

(3) Mental Defectives

(a) A mental defective whose intelligence is below some level not clearly established, and which in any event cannot be measured in the police station, is unable to comprehend or act in a manner appropriate to a valid waiver. For examples of persons whom the courts consider to be in this group, see Culombe v. Conn., 367 U.S. 568 (1961) (illiterate moron); U.S. v. Myers, 240 F. Supp. 39 (1965) (mental defective); Jones v. U. S., 342 F2d 863 (1964) (stopped school at third grade, could not read, could barely write); Blackburn v. Alabama, 361 U.S. 199 (1960) (history of insanity); Reck v. Pate, 367 U.S. 433 (1961) (left school at 7th grade, repeatedly classified as retarded and mentally deficient, spent one year in institution for the feebleminded); Cooper v. Comm. (Va.), 140 SE2d 688 (1965) (lower limits of normal intelligence).

(b) If the information available to the officer from the booking interview, or otherwise, indicates that the accused may be a mental defective it would be wise to first - before interrogation for evidence of guilt - take the accused to a magistrate for warning and waiver purposes or to obtain some competent person to counsel the accused during the police warning and waiver procedure.

(4) Sick or Wounded Persons - An accused can be so sick, or so badly injured, that he is incapable of full comprehension and intelligent action. Such a person cannot give a valid waiver. For example, the accused was taken to a hospital for emergency surgery which required four hours. He was kept under sedation, given oxygen, blood transfusions, and oxygen administered intravenously. Four days after admission to the hospital he gave a confession to the prosecuting attorney. The confession was excluded from evidence. Griffith v. Rhay, 282 F2d 711 (1960), cert. den. 364 U.S. 941.

(5) Intoxicated or Drugged Persons

(a) It is obvious that a person can be so drunk or so drugged that he is mentally incapable of either understanding his constitutional rights or of making an intelligent decision on the waiver of those rights. Throwing out a confession given by one who was "arrested for driving under the influence," a Federal court said, "This state of intoxication prevented the petitioner from making a confession which could be considered voluntary. The court said also that "no such waiver can be said to have taken place in this case. The petitioner in his condition was incapable of acting knowingly or intelligently." Logner v. North Carolina, 260 F. Supp. 970 (1966). See also Mallory v. U.S., 259 F2d 796 (1958).

(b) As to drugs, the Supreme Court said: "It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum'." Townsend v. Sain, 372 U.S. 293 (1963). See also Lindsey v. U.S., 237 F2d 893 (1956); Griffith v. Rhay, 282 F2d 711 (1960), cert. den. 364 U.S. 971; 21 Federal Rules Decisions 199, 202.

(c) The rule on intoxicants does not mean that a person is unable to give an admissible statement simply because he has some quantity of intoxicants or drugs in him at the moment. Some slight degree of intoxication, for example, does not make the statement inadmissible. There must be shown a substantial impairment of the mind and will before drink can make a confession inadmissible. Wigmore on Evidence, 3rd Ed., Vol. 2, Sec. 499. See also U. S. ex rel. Burke v. Denno, 243 F2d 835 (1957), cert. den. 355 U.S. 849. The same rule applies, presumably, to drugs. See 69 ALR 2d 384, 385; U. S. v. Ray, 183 F. Supp. 769 (1960); U. S. v. Moore, 290 F2d 436 (1961), cert. den. 368 U.S. 858; Palakiko v. Hawaii, 188 F2d 54 (1951); U.S. v. Robinson, 327 F2d 959 (1964.) Confessions have been admitted into evidence after proof that despite the drugs in his body when he confessed, the accused was at that time in full possession of his faculties.

(d) The difficult question for the interrogating officers in many situations is that of determining whether the accused is under the influence of so much intoxicants or drugs that he clearly is incapable of making an admissible statement. There is no yardstick other than the judgment of the officer in each individual case, although the opinion of a medical doctor may be of value. If the accused is obviously drunk or similarly incapacitated by drugs, there is no choice but to let him "sober up" before the interrogation takes place. See Mallory v. U.S., 259 F2d 796 (1958); Unsworth v. Gladden, 261 F. Supp. 897 (1966).

(e) A less frequent but equally difficult problem is found in those cases in which the accused is in a poor mental and physical condition because he is suffering from withdrawal of narcotics or liquor. May he be given enough drugs or liquor to bring him back to "normal" and then interrogated for evidence of his own guilt? Would he then be better able to understand his rights, and to make a valid waiver? Possibly. In U.S. v. Ray, 183 F. Supp. 769 (1960), the accused was arrested in North Carolina (in 1942) by FBI Agents for robbing a bank in Maryland. In the words of the court, "as the defendant when arrested was in bad physical condition and craved more narcotics, the FBI Agents called in a local physician who gave the defendant a small narcotics dose." The accused then signed two papers, one waiving appearance before a U.S. Commissioner and the other agreeing to return to Baltimore with the Agents. Tried and convicted, the accused 18 years later brought petition to vacate the sentence, and mentioned therein his physical condition at the time of apprehension. Further, he claimed that he did not understand the papers which he had signed. The Federal court dismissed his petition and remanded him to custody.

(6) Aliens and Foreign Born - An alien, or even a recently naturalized citizen of foreign birth and education, may be so unfamiliar with the language, laws, and customs of this nation that he cannot fully comprehend his constitutional rights or make a knowing and intelligent decision on whether any of those rights should be waived for police interrogation. See Escobedo v. Illinois, 378 U.S. 478 (1964); Gallegos v. Nebraska, 342 U.S. 45 (1951), dissent; Spano v. New York, 360 U.S. 315 (1959); People v. Hamilton, 359 Mich. 410 (1960). Where any substantial difficulty with the language appears, the entire language of the warning and waiver process should be given to the accused in his original native tongue by a person fully competent in that language. If the officer cannot find an interpreter who is fully competent, he should take the best interpreter available under the circumstances and be aware that the qualifications of the interpreter may well be one point on which the defense will attempt to exclude the statement given by the accused.

(7) Accused Arrested and Represented by Counsel

(a) Some police officers report having been told that once the accused has been arrested and has obtained counsel, either retained or appointed, no officer may obtain from the accused an admissible statement without consent or presence of counsel. Such action is said to violate the defendant's Sixth Amendment right to counsel. The assumption is, apparently, that under these circumstances the accused is legally incapable of waiving his constitutional rights no matter how well he may have been advised of them by the interrogating officer, and that his First Amendment right to speak has been surrendered to counsel. Is this correct?

(b) Although the issue is not completely resolved, several Federal courts have allowed statements obtained under these circumstances into evidence. For example, in a state case which was raised to the Federal courts, a murder suspect came to the police station with his attorney and refused to give information. The attorney said to an officer, "If you ever want to see my defendant again, or if you want to question him, if you let me know I will have him in your office within two hours." Three days later the police arrested the suspect and took him to the station where he was interrogated by the officer mentioned above and another. The accused made certain statements to which the officer testified at trial. The conviction was affirmed. Loftis v. Eyman, 350 F2d 920 (1965). In another case the defendants had been arrested, given a hearing, released on bail, and had counsel. Federal officers interviewed them and obtained statements which were used at trial. In affirming the conviction, the court said, "We perceive no incompatability with either the letter or the spirit of the Fifth or Sixth Amendment or with Rule 5(a) if a defendant, duly cautioned by his attorney against speaking to investigating officers after he has been released from custody, disregards the attorney's admonition and speaks willingly when he is free to remain silent." U.S. v. Bellamy, 326 F2d 389 (1964). Other decisions have taken the same position; U.S. v. Collins, 349 F2d 296 (1965) (Accused interviewed while in jail); Beavers v. U.S., 351 F2d 507 (1965); Fisher v. U.S., 324 F2d 775 (1963). In Fisher the court upheld use of the statements but said the practice of interrogating an accused without presence or consent of counsel "should be condemned for ethical reasons."

(c) The view that an arrested accused who has counsel is unable to make a valid waiver of his Fifth Amendment right to silence and his Sixth Amendment right to counsel overlooks the fact that the accused has a right to reject counsel and a right to confess when he takes such action voluntarily and understandingly. Carter v. Illinois, 329 U. S. 173 (1946). And he at all times retains his First Amendment right to speak, regardless of the wishes of his counsel or the presence or absence of counsel. See Jones v. U.S., 342 F2d 863, 879 (1964).

(8) Accused Under Indictment, or Information Filed

(a) May the police obtain an admissible statement of guilt, by interrogation, from an accused who is now under indictment or who has had an information filed against him? The question is not resolved. Some courts say they may not, basing their view on the decision of the Supreme Court in Massiah v. U.S., 377 U.S. 201 (1964). For example, one Federal court said that Massiah "would certainly suggest that any form of post-indictment interrogation when a defendant is not assisted by an attorney unlawfully abridges the right to counsel guaranteed by the Sixth Amendment." U.S. v. Guerra, 334 F2d 138 (1964), cert. den. 379 U.S. 936. See also Lee v. U.S., 322 F2d 770 (1963).

(b) It is assumed here that the Miranda decision still permits an indicted accused, in jail or out, to volunteer a confession or admission of guilt.

78.3 PROVING THE WAIVER

(1) The Prosecution Must Prove the Waiver - The prosecution must prove that the accused waived his rights. The accused does not need to prove that he did not waive them. The Court said that where the required warnings have been given and "the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (Emphasis added).

(2) Proof May be Difficult

(a) It seems likely that the task of proving that a waiver of rights was obtained from the accused will be the hardest part of complying with the rule of the *Miranda* decision. The decision itself states that the task will be difficult where it speaks, as quoted above, of the "heavy burden" of the prosecution in proving a waiver. The task is made even harder by the fact that the waiver must be shown to have existed continuously, from the beginning of the statement to the end. As the opinion states, "Where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to revoking his right to remain silent when interrogated." At an earlier point in the decision, the Court said, "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning."

(b) In most courts the proof of waiver will require something more than the officer's testimony that the man waived his rights. There should be in each case, if possible, some documented evidence of both warning and waiver such as is provided by the printed and signed warning and waiver form. The courts will require that the waiver be proven by some articulated response or express statement by the accused that he did waive his rights. This is what the *Miranda* decision demands. If the accused states orally that he is uncertain of what he ought to do, or makes any statement that is not clearly a waiver of his rights, the courts will find that no waiver was given. In all cases in which the waiver is not signed, there is no waiver unless the officer is prepared to testify from his own notes, or better proof, to the use by the accused of specific words which clearly indicates a waiver.

(c) A record of events in the form of a log kept during the arrest, search, and interrogation procedure may prove to be of considerable help in establishing the waiver where a waiver is obtained. As to the interrogation, the log should note the time and place where the warnings were given, and by whom given. It should note the time of the waiver and, if given orally, the exact words or the best possible paraphrase of the words used by the accused to give the waiver. If the accused later revokes his waiver and refuses to discuss the case further, the exact time and language should again be entered in the log and a statement or other record of what the accused said up to this point should also bear a notation of the precise time at which he revoked his waiver.

(3) Avenues of Defense Attack on the Waiver - The possible avenues of defense attack on the waiver are numerous. Some of them are as follows:

(a) No Capacity to Waive - Accused incapable of waiving because of tender years, subnormal mentality, or temporary mental or physical condition, such as drunkenness. See "78.2- Waiver Impossible - Accused Incapable of Waiving".

(b) Waiver not Clear - In cases of oral waiver, that the words of the accused used to waive his rights were not clear and unequivocal.

(c) Waiver Revoked - That the accused once gave the waiver to the officer but later changed his mind and revoked it, and the officers continued to interrogate him and obtained a statement after the revocation.

(d) Prolonged Interrogation - That even though the accused may have given what appeared to be a waiver of his rights, he did so during a period of interrogation so long that the officers obviously had broken down his will power. As the Court said, "Whatever the testimony of the authorities is as to the waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." The obvious answer is to keep the interrogation and statement as short as possible.

79. SOME IDEAS FOR CONSIDERATION

(1) Each law enforcement agency should consider immediately what specific steps it can take to comply most fully with the requirements of the Miranda decision.

(2) Obtain from your prosecutor or other legal counsel a proper statement of each of the required warnings and a statement of a waiver. Make this available to each officer. The officer should have the words of both the warnings and the waiver on a card, which may be laminated for protection, to be carried with him.

(3) Give the warning of rights to any person who is being deliverately questioned concerning his own guilt of a specific offense and (a) is in actual physical custody of any law enforcement agency or (b) against whom you have a warrant of arrest, or (c) is in some condition in which the difference between arrest and nonarrest is no more than a bare technicality. Be sure to make a note or other record of the date, time, and place of the warning, by whom the warnings were given and the language of the warning. If the officer gives the warning from the card which he carries, he can later testify that he gave the warnings shown on that card.

(4) Give the warning at the very outset of questioning concerning his own guilt - before any questions are asked of him.

(5) Advise the accused of the crime with which he is charged or of which he is suspected. The Supreme Court has emphasized the right of the accused to this information. Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949).

(6) Ask the accused specifically whether he is now willing to discuss the case at this time and place without counsel. If he answers in the affirmative, record the fact of the time, quote the words which he used in his affirmative reply, make a note of his physical and mental condition, and proceed.

(7) If the accused indicates in any way and at any time that he does not wish to talk, the questioning must cease until he is ready of his own initiative, if ever. If the answer of the accused is uncertain - neither a clear affirmative nor a flat negative - the officer must use his own judgment in determining whether the accused intended to waive or not. If the officer's judgment is that the accused intended to waive, the officer should record the exact language used by the accused and then proceed with the interrogation.

(8) If the accused gives a statement and is willing to sign it in writing, repeat in the preamble to the signed statement the entire warning, the fact of the waiver, the date, place, time, and to whom given. Consider with the prosecutor the possibility of showing warnings, waiver and statement in one single document. At the top of a sheet of paper commonly used for signed statements, write out the warnings and waiver statement, using the language previously approved by the prosecutor. Show time, date and place, and names of officers as in the past. If the accused will waive and sign, ask him to sign immediately below the sentence on waiver. The officers may sign as witnesses, and show the exact time. If the accused will waive but does not wish to sign, the officers will endorse on the document the fact of waiver given orally after advice of rights, and then sign as witnesses and show the exact time and words of waiver. See Wong Sun v. U. S., supra. In either case, a waiver signed or a waiver unsigned - the statement given by the accused may be recorded on the same page, beginning on the first line available after the warnings and waiver procedure. If the accused is willing to sign, have him sign again at the end

of the statement, with the officers again signing as witnesses and showing the time. If the accused acknowledges this to be his story but will not sign, the officers should again endorse this fact on the statement, as the officers did in Wong Sun, supra, and then sign as witnesses and show the time.

(9) If the accused wants a lawyer, refer his request immediately to the judge, prosecutor or other official or agency with whom prior arrangements have been made.

(10) When the lawyer appears and after he has conferred with the accused, in private if they desire, (and assuming that no objection is raised to questioning at that time) decide whether the accused should be questioned in the presence of counsel or, instead, be given the opportunity of stating any information which he may wish to volunteer at that time.

(11) Keep all interrogation and signed statements as short as the necessity of the case will allow. The Supreme Court warned that a lengthy interrogation is some indication of pressure which suggests that the waiver of rights was not voluntary.

(12) Scrupulously avoid all mistreatment of the accused such as threats or promises, or denying him sufficient food, clothing and sleep. Any mistreatment may be used by the defense to show that because of pressure of this type, either physical or psychological, the waiver which the accused gave was not given voluntarily.

(13) Bear in mind at all times that a great deal of the case may ride on your conduct during interrogation. If there is any failure in the warnings and waiver procedure, the Miranda rule knocks out of evidence not only the confession or admission itself, but also any other evidence which is the direct product of that confession or admission.

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INTERPRETING MIRANDA v. ARIZONA

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(3-71)

DEPARTMENT OF JUSTICE

WASHINGTON, D. C. 20530

July 30, 1970

MEMO NO. 597 REV.

TO ALL UNITED STATES ATTORNEYS

Subject: Survey of Cases Interpreting _Miranda_ v. _Arizona_.

Enclosed is a memorandum discussing the major problems that have arisen in the Federal courts involving the interpretation of _Miranda_ v. _Arizona_, 384 U.S. 436 (1966). Litigation concerning that decision has been extensive and this memorandum is designed to bring together the significant Federal decisions.

This memorandum incorporates the material in the original _Miranda_ survey memorandum, Memo. No. 597. Memo No. 597 should, therefore, be discarded.

Will Wilson

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SURVEY OF CASES INTERPRETING MIRANDA v. ARIZONA.

This memorandum is a survey of the federal court decisions interpreting Miranda v. Arizona. 1/ Included are cases reported through volumes 303 of the Federal Supplement and 421 of the Federal Reporter Second Series, plus several court of appeals cases available only in slip opinions at this date.

I. CUSTODIAL INTERROGATION WITHIN THE MEANING OF MIRANDA.

Of the several major issues that have arisen as the federal courts have dealt with Miranda, this is the area with the greatest amount of conflict and case law. Miranda defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 2/ If any generalization is possible, it is that the courts as a whole have given a restrictive interpretation to this definition. This is illustrated by the cases concerning the following situations.

A. Interviews in the suspect's home or place of work.

Since the major concern expressed by the Miranda opinion was the likelihood of inherently coercive surroundings causing a confession, it was logical for the federal courts to differentiate between situations where the suspect is in familiar surroundings and situations where he is in areas controlled by law enforcement personnel. This differentiation has clearly been reflected in the case law.

An example of the cases dealing with visits to a person's home or office by federal agents is Evans v. United States. 3/ During

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1/ 384 U.S. 436 (1966). Miranda applies to trials commended after the date of the opinion and to retrials only if the original trial began after that date. See Johnson v. New Jersey, 384 U.S. 719 (1966), and Jenkins v. Delaware, 395 U.S. 213 (1969).

2/ 384 U.S. at 444.

3/ 377 F. 2d 535 (5th Cir. 1967). See also Archer v. United States, 393 F.2d 124 (5th Cir. 1968); McMillian v. United States, 399 F. 2d 478 (5th Cir. 1968) (questioning on suspect's front porch).

an investigation into bank discrepancies, FBI agents went out to see the defendant at, apparently, her home, but clearly at some place other than a building used for law enforcement purposes. After a full Miranda warning the defendant discussed the discrepancies and ultimately admitted her guilt. No arrest took place at that time. The defendant later objected to the use of her admissions at trial, alleging that there had been no waiver. The Fifth Circuit rejected the claim, holding that the defendant was not in custody or deprived of her freedom of action in the slightest degree. The court held that her actions were voluntary and that none of the compulsive factors referred to in Miranda were present. 4/

While in Evans the defendant had been fully warned and tried to invoke Miranda only on the issue of waiver, the same result followed in United States v. Essex 5/ where a full Miranda warning had not been given, but where the FBI agents had been talking to the defendant in her home. In this case, the court pointed to the fact that no indictment had yet been returned and that in essence this discussion in the defendant's home amounted to general questioning of a citizen somewhat akin to on-the-scene investigation. This was said not to be within the Miranda rule. 6/

In O'Toole v. Scafati, 7/ an assistant district attorney called on a local town manager in the latter's office to give him a chance to explain overexpenditures. Statements by the defendant were

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4/ The same result follows when questioning occurs on a park bench or in a public restaurant, United States v. Messina, 388 F. 2d 393 (2d Cir. 1968), cert. denied, 390 U.S. 1020 (1968), or in a taxi cab, Sharbor v. Gathright, 295 F. Supp. 386 (W. D. Va. 1969).

5/ 275 F. Supp. 393 (E. D. Tenn. 1967).

6/ See also Menedez v. United States, 393 F. 2d 312 (5th Cir. 1968) (agent called on defendant at his home to discuss his involvement in a lottery — held not custodial interrogation); United States v. Manni, 270 F. Supp. 103 (D. Mass. 1967) (agents knocked at defendant's door, were invited in, and then asked about an illegal firearm in plain view — held not custodial interrogation).

7/ 386 F. 2d 168 (1st Cir. 1967), cert. denied, 390 U.S. 985 (1968).

used against him though no warnings had been given. The court held the statements admissible, commenting that the defendant was neither in custody nor in an alien enviroment, but in his own office.

The mere fact that interrogation takes place in surroundings which are familiar to a suspect will not eliminate the possibility of a successful Miranda challenge. In Orozco v. Texas, 8/ four police officers were admitted into a private dwelling and questioned a murder suspect in his bedroom late at night. The four officers surrounded the suspect during the questioning, and admitted at trial that from the time he gave his name the suspect was not free to go and was under arrest. The State argued that Miranda should not apply to interrogation in petitioner's own bedroom. The Supreme Court disagreed, stressing that under the circumstances the defendant had been significantly deprived of his freedom of action.

In Windsor v. United States, 9/ two defendants confessed to a Dyer Act offense and told FBI agents that a third defendant was in a certain motel. When the agents arrived at the motel, they gave the defendant a warning which did not constitute a full Miranda warning, and stated that he was not under arrest or being detained in any way. The Fifth Circuit stated that, in effect, the defendant was being detained despite the agents' statements to the contrary. The court pointed to the fact that the agents knew of this defendant's involvement from interrogating the others and had probable cause to arrest when they arrived. Merely telling the defendant that he was not under arrest cannot be used, said the court, to frustrate the principles of Miranda. The court also said that the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on this particular defendant, citing Escobedo v. Illinois. 10/

8/ 394 U.S. 324 (1969).

9/ 389 F. 2d 530 (5th Cir. 1968).

10/ 378 U.S. 478 (1964).

It is somewhat difficult to distinguish the Windsor case from Evans v. United States, 11/ cited above, decided by a different panel in the same circuit. If the decisions are to be reconciled, it appears that a line has to be drawn between questioning where no arrest is contemplated and questioning in circumstances where an arrest is almost certain to take place. This distinction could make the custody test turn on the subjective intent of the agents. However, in light of Orozco, it is also possible to interpret the Windsor decision to mean that because of the subjective feeling of the officers their action manifested to the suspect that he was in custody at the time of the questioning. Windsor is one of the few cases that still discusses the idea of an investigation "focusing" on a particular suspect as enunciated by Escobedo.

While a few decisions seem to center on the subjective intent of the law enforcement officers involved, 12/ others stress the state of mind of the suspect. For instance, in United States v. Davis 13/ a crew member was held on a ship, under what the court itself called "detention", 14/ for an hour and a quarter while a search for narcotics went on. During the search, the defendant was permitted to use the bathroom only under escort and after his person was searched. Marijuana cigarettes were found in the defendant's cabin and, when asked where he got them, he made damaging admissions. Later the agents returned with an arrest warrant for the defendant. (During the interim defendant had been free to move about and could have left the ship.) Prior to arresting him, more questions were put to him and more admissions were made. At this point, a formal arrest was made, and warnings were given for the first time. On defendant's motion to suppress, both admissions were held

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11/ Supra, note 3.

12/ See Bendelow v. United States, 418 F. 2d 42 (5th Cir. 1969); Windsor v. United States, supra, note 9; Chavez - Martinez v. United States, 407 F. 2d 535 (9th Cir. 1969).

13/ 259 F. Supp. 496 (D. Mass. 1966).

14/ 259 F. Supp. at 497.

admissible. The earlier detention and questioning was held not to constitute custodial interrogation, and the court said that defendant had not been deprived of his freedom in any significant way. The later statements, made to the agents who already possessed an arrest warrant, were held admissible because at the moment of his questioning defendant did not know of the existence of the warrant, and, further, did not believe himself to be in custody. This interpretation of custodial interrogation thus goes to defendant's own state of mind. If he does not believe himself to be in custody he is under no different psychological pressure than any other individual being questioned by a law enforcement officer. It rejects entirely the state of mind of the agents, who in this case already had an arrest warrant for the defendant, and were adding to their case against defendant by their questions.

A similar approach was used in affirming a bank robbery conviction in United States v. Scully. 15/ In that case, the defendant was offered the choice of talking to law enforcement agents at home or at the stationhouse. The court found that the defendant's refusal to answer certain questions without an attorney, his termination of the interview, and his freely walking out, manifested that he did not believe he was in custody during the questioning.

Whether a court attempts to ascertain the subjective feelings of the police as in Windsor, 16/or the subjective feeling of the suspect as in Davis, 17/ there is a certain amount of futility in attempting to determine the issue of custody by probing the minds of the parties involved. Judge Friendly of the Second Circuit, noting this problem, said in United States v. Hall: 18/

15/ 415 F. 2d 680 (2nd Cir. 1969). See also United States v. Weston, 417 F.2d 181 (4th Cir. 1969) (defendant, by his refusal to answer and his leaving the office, indicated that he did not understand himself to be in custody), and Lucas v. United States, 408 F. 2d 835 (9th Cir. 1969).

16/ Supra, note 9.

17/ Supra, note 13.

18/ 421 F. 2d 540 (2nd Cir. 1969).

> ". . . . but the Miranda Court could hardly have intended the "custody" issue to be decided by a mere swearing contest in which the police and the suspect would invariably give conflicting testimony about their transient, subjective beliefs on the "free to go" issue. . . ."
>
> "Moreover, any formulation making the need for Miranda warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses . . . ."
>
> "[W]e do think . . . [Miranda footnote 46] suggests that in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so. This is not to say that the amount of information possessed by the police, and the consequent acuity of their "focus", is irrelevant. The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers Miranda, and vice versa. But this is simply one circumstance, to be weighed with all the others . . . ."
>
> "Factors like the restricted size of the apartment, the number of officers present and the extent of questioning must be weighed against the quantity of information that the agents had, and its consistency-with-innocence potential." 19/

19/ Id. at 544-545. See also United States v. Montos, 421 F.2d 215 (5th Cir. 1970).

The approach of Judge Friendly attempts to add objectivity to the test of custody. In effect this approach is similar to the test used in the law of contracts, in that subjective states of mind are determined by the objective manifestations of the person's intent. The line of cases dealing with interrogation in the home seem to follow this approach sub silentio. The objective fact that the suspect is in familiar surroundings bears heavily on the issue of whether he (or a reasonable man) would feel compelled to talk.

It should also be noted that despite the fact that some courts center on the state of mind of the officer, logically only the subjective feelings of the suspect are relevant as to whether statements were coerced. Only to the extent that the manifestations of the officer's state of mind would influence the suspect's state of mind, do the officer's feelings bear on the ultimate issue of whether a suspect's statement were a result of his own free will. Although most courts do not articulate this line of reasoning, the majority of the decisions seem to coincide with this approach.

One objective fact which generally seems to convince most courts of the non-custodial nature of questioning is the suspect's leaving after or during the questioning. 20/ This is consistent with tests centering on either the officer's of the suspect's state of mind. From the standpoint of the officer's subjective intent, letting the suspect leave is convincing evidence that he was not in custody. The fact that the suspect left also indicates he did not feel compelled to stay and answer questions. This was the basis for the decision in United States v. Clark. 21/ While on patrol, officers became suspicious of the defendant and stopped him. They asked what he had done with the paper bag the officers had seen him carrying. He said that it was his

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20/ See United States v. Scully, supra, note 15; United States v. Weston, supra, note 15; Posey v. United States, 416 F. 2d 545 (5th Cir. 1969); United States v. Brevik, 422 F. 2d 449 (8th Cir. 1970); United States v. Knight, 261 F. Supp. 843 (E. D. Pa. 1966).

21/ 294 F. Supp. 1108 (W. D. Pa. 1968).

lunch and that he threw it away. The defendant and the officers searched the area for it, and, after failing to find it, the defendant left. The police later found the bag and discovered that it contained drugs. Defendant's motion to suppress evidence of the conversation was denied.

B. *On-the-scene questioning and automobile stops*.

The trend toward a restrictive interpretation of custodial interrogation can be seen most clearly by an examination of cases dealing with on-the-scene investigations. In *Miranda* the court stated: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." 22/ Courts have been quick to find various investigations to be "general."

Usually routine questioning initiated by police after stopping autos -- relating to drivers licenses, registrations, ownership, etc. -- need not be preceded by *Miranda* warnings. 23/ However, if the initial questioning develops evidence of criminal activity, at some point warnings may become necessary. For example, in *Bendelow* v. *United States*, 24/ police stopped the defendant's automobile and asked for his identification. After discovering that the defendant's driver's license had been altered, the officer asked more probing questions. The court found that while no warnings were initially necessary, once the alteration was noticed warnings were required because at that time the officer's investigation focused on the accused.

22/ 384 U.S. at 477.

23/ *United States* v. *Edwards*, 421 F. 2d 1346 (9th Cir. 1970); *Lowe* v. *United States*, 407 F. 2d 1391 (9th Cir. 1969); *James* v. *United States*, 418 F. 2d 1150 (D. C. Cir. 1969); *Sablowski* v. *United States*, 403 F.2d 347 (10th Cir. 1968); *Clark* v. *United States*, 400 F. 2d 83 (9th Cir. 1968), cert. denied, 393 U.S. 1036 (1969); *Bendelow* v. *United States*, 418 F. 2d 42 (5th Cir. 1969).

24/ 418 F. 2d 42 (5th Cir. 1969).

In Allen v. United States, 25/ a policeman stopped a car late at night for failure to have its headlights on. The driver was unable to produce any registration. The officer then noticed a passenger in the back seat who was badly beaten. After asking the driver to step out of the car, the officer asked the passenger who had beaten him. The passenger mumbled something incoherent and made a motion with his hand toward the driver. The officer directed his flashlight beam on the driver's hands and noticed that they were red and swollen. At this point he asked the driver if he was the one who had beaten the passenger. The driver, who had not received any warnings, admitted that he had done so. The officer then called the station house, learned that the car had been stolen, and placed the driver under arrest. At his trial for assault and unlawful use of a vehicle, the driver's statement to the officer was admitted. Although the case was remanded for a hearing on another issue, the Court of Appeals for the District of Columbia ruled that this statement was properly admitted. The court based its findings on the conclusion that there was no custodial interrogation and that all that had transpired could be classified as on-the-scene investigation. The court stated that custodial interrogation could not be determined by reference to some clearly defined chart, nor could it be simplified by saying that whenever an officer is prepared to detain someone he may not ask any questions. To do so, said the court, would venerate form over the substance of sound police-citizen relations. The court indicated that a material factor in such cases is whether or not the police were still in the investigatory stage. It went on to hold that on-the-scene investigations usually necessitate some form of limited restraint so that the police can screen crimes from relatively routine events. Since citizens often forget car registrations, brief detentions to check out the possibility of theft could not, in the court's opinion, produce the kind of custodial situation contemplated in Miranda. As to the fact that the victim had pointed a finger at the defendant, the court stated that this identification was not that obvious, given the condition of the victim. The holding stresses that the courts must look to the essence of the situation, and that in this case the essence of the case was not that of an officer staging an interrogation that had focused on the defendant, but of an officer reacting to a street situation and trying to run down the facts. At first glance it might appear that the Allen

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25/ 390 F. 2d 476 (D. C. Cir. 1968).

decision conflicts with the Bendelow decision. However, in Bendelow notice of the alteration of the driver's license was unequivocal notice of a crime. In Allen, on the other hand, it was not clear that defendant had committed a crime; there was merely sufficient evidence to investigate further.

In a similar case in the Second Circuit, 26/ railroad policemen observed two suspects carrying cartons late at night near a railroad yard. When stopped by the officers, the two made exculpatory statements that were later used against them in court. The court determined that under applicable law there had been no arrest and that there had been no significant deprivation of freedom involved. The court pointed to the fact that there had been no restraining, handcuffing, frisking, or the like. Under such circumstances, the questioning, which related to where the defendants had obtained the cartons they were carrying, was held to be on-the-street questioning to determine if any crime had been committed and not to be custodial interrogation. 27/

In United States v. Montos, 28/ postal inspectors waited for the defendant at his car in a parking lot in order to question him in regard to missing postal packages they had planted to test his honesty. When the defendant approached, the inspectors moved their car to block the defendant's car. Two questions regarding the defendant's handling of the packages preceded Miranda warnings and the formal arrest. The court found there was no custodial interrogation prior to the arrest, despite the fact that the defendant's car had been blocked.

26/ United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968).

27/ See also United States v. Brady, 421 F. 2d 681 (2nd Cir. 1970).

28/ 421 F. 2d 215 (5th Cir. 1970).

In Jennings v. United States,[29] the Fifth Circuit was faced with a situation very much like that it faced in Bendelow. A policeman was examining a parked automobile on which he had a theft report. The defendant came up to him and asked what the trouble was. The officer then asked him if he owned the car. The defendant said that he did and produced a registration and driver's license which was patently not his. At this point an arrest was made. What had preceded the arrest was said not to be custodial interrogation, and the court stressed the fact that the defendant initiated the conversation and was not coerced in any way by the officer. The Fourth Circuit had a case with similar facts in United States v. Gibson,[30] except that in Gibson the officer learned that the driver was in a tavern and went inside and asked him to step outside. At this time all the officer knew was that the automobile might have been stolen. Once outside, the suspect, without warnings, was questioned about ownership of the car. After first denying that he owned a car, he then admitted it was his car and produced an altered registration slip. The admission was used at the suspect's trial. Its use was upheld on appeal on the basis that all that had taken place was an on-the-scene investigation. The defendant claimed that by asking him to step outside the officer had placed him in custody. The court rejected this, stating that Miranda was aimed at police station and squad car interrogations and not at this type of general investigative questioning. The court stated that the key factor was the atmosphere of the investigation. The questioning was brief, it was conducted on the sidewalk in front of the tavern, the atmosphere was non-coercive and the defendant was, in the court's opinion, free to leave at any time. The court also stressed that the officer was still not certain even that the car had been stolen or that this suspect had stolen it. Based on all these factors, it was held that the questioning did not amount to custodial interrogation.

29/ 391 F. 2d 512 (5th Cir. 1968).

30/ 392 F. 2d 373 (4th Cir. 1968).

In each of these cases (Allen, Bendelow, Thomas, Jennings and Gibson) the facts are susceptible to a holding that the suspect was being held in custody and that Miranda warnings should have been given prior to any questioning. None of these cases from four different circuits goes that far. Seemingly the courts will find an investigation to be of the general on-the-scene variety whenever reasonably possible. For the most part, they refrain from a finding of custodial interrogation unless or until an arrest has clearly taken place. 31/ One district court has even stressed the fact that a formal arrest is required. In United States v. Littlejohn, 32/ agents were tipped off that the suspect would be transporting untaxed liquor in a specifically described automobile. After observing the vehicle and suspicious activity, the automobile was stopped by the agents on a public highway. The agents displayed their badges and asked the defendant what he was carrying. The defendant admitted that it was liquor. The contents of the automobile were inspected and a formal arrest followed. The defendant's motion to suppress his admission was denied. The district court ruled that any claim that warnings should have been given has validity only if an arrest can be found at the time the automobile was stopped on the highway. The court stated that no arrest occurred then and that the defendant could not have believed himself in custody. Until the formal arrest occurred all that had transpired was a mere on-the-scene investigation, and no warnings were required.

31/ There is an interesting line of cases in the District of Columbia Circuit reaching the same general conclusion. See Green v. United States, 234 A. 2d 177 (D. C. Cir. 1967); Keith v. United States, 232 A. 2d 92 (D. C. Cir. 1967); Perry v. United States, 230 A. 2d 721 (D. C. Cir. 1967); White v. United States, 222 A. 2d 843 (D. C. Cir. 1966). Where a person stopped by the police is asked to go to the stationhouse to verify identity and automobile ownership, a custodial situation has been held to exist. United States v. Pierce, 397 F. 2d 128 (4th Cir. 1968). See also United States v. Mendoza-Torres, 285 F. Supp. 629 (D. Ariz. 1968).

32/ 260 F. Supp. 278 (E.D.N.Y. 1966). See also People v. Agy, 374 F. 2d 94 (6th Cir. 1967). For a different result on virtually the same facts as in Littlejohn, see United States v. Davis, 265 F. Supp. 358 (W.D. Pa. 1967).

In cases involving automobile stops the courts generally summarily refer to the language in Miranda indicating that general on-the-scene questioning need not be preceded by warnings. Another way to analyze these cases is that while a person stopped in his own car is technically detained, such detention is of such a routine nature that there is no compulsive influence present, at least not until the questioning begins to cover areas not normally associated with the use of automobiles.

C. Stationhouse questioning.

Miranda was designed specifically to cover the questioning of suspects held in custody at a stationhouse. This has been extended to include a statement made to a United States Commissioner on Guam in the latter's office without warnings having been given. 33/ Here the defendant had been asked by the Commissioner, who acts on Guam with the authority of a peace officer, to come to the latter's office, and the court deemed this to be a clear assertion of custody. The requisite custody has also been found in a border search by immigration officials. 34/ In this case the defendant was made to disrobe in a room set aside for immigration agents at an airport and was found to have plastic bags containing a white powder taped to his body. Without any warnings he was asked what the bags contained, and he responded "heroin". The admission was suppressed.

The mere fact that a person is interrogated in law enforcement offices does not in and of itself necessitate Miranda warnings. The key is whether the suspect appeared voluntarily and remained without the assertion of custody. If so, there is no such inherently compelling situation as would require the giving of warnings. 35/

33/ Rosario v. People of the Territory of Guam, 391 F. 2d 869 (9th Cir. 1968).

34/ United States v. Berard, 281 F. Supp. 328 (D. Mass. 1968).

35/ See e.g., United States v. Scully, supra, note 15; Posey v. United States, supra, note 20.

In Lucas v. United States, 36/ a night club manager notified authorities that a counterfeit $20 bill was passed by the defendant. A sheriff came to question the defendant and, in response to the defendant's question, told him that he was not under arrest. The defendant said he received the bill in a pool hall. The officer asked the defendant if he would give a statement to that effect. The defendant agreed to accompany the officer to the sheriff's office, locked his car, and left. The court found that defendant had not been taken into custody and that the statement given at the sheriff's office was admissible.

In another case, 37/ where a post office box was under surveillance in a mail fraud investigation, the defendant was observed opening the box and removing two previously marked letters. The defendant was stopped by a postal inspector and invited to go to the inspector's office. At the office the defendant was given an inadequate Miranda warning, a talk followed, and he made damaging admissions. The court held that the defendant was at no time in custody or otherwise deprived of his freedom.

In United States v. Knight, 38/ the defendant, then a civilian, was invited by telephone to come to the offices of special investigators for the Air Force to discuss thefts that had occurred while he was still in the service. He did so and was given a warning that was inadequate under Miranda. After first denying involvement, he admitted his guilt. He left the office freely and was indicted several months later. The court held that his appearance was voluntary, that he had been under no compulsion to appear, and that he could have left at any time.

36/ 408 F. 2d 835 (9th Cir. 1969).

37/ United States v. Appell, 259 F. Supp. 156 (D. Mass. 1966).

38/ 261 F. Supp. 843 (E. D. Pa. 1966).

The court pointed to the fact that he did leave at the end of his interrogation. Defendant's claim that he was in constructive custody and that his admissions were motivated by "military fear" 39/ and similar psychological factors was rejected for lack of any supporting evidence. 40/

Nor is a suspect's presence at the stationhouse a bar to the admissibility of a spontaneous statement made with no prior warnings. In Hicks v. United States, 41/ the defendant had reported that her boyfriend had been stabbed to death by unknown assailants. At the stationhouse she gave a full statement as a witness, and was apparently not under suspicion herself. As a detective was preparing to take her home she suddenly stated that she was in trouble. She then said that she had stabbed the decedent. The detective stopped her at this point and gave her a full Miranda warning. Her statement was ruled admissible, the court holding that this was not a case of custodial interrogation. The court clearly indicated that stationhouse questioning of a purported witness (as opposed to a suspect) cannot be deemed custodial interrogation. As the defendant was in the stationhouse as a witness and then blurted out a statement voluntarily and not in response to any questioning, no Miranda problems arose.

In Bowman v. Peyton, 42/ the defendant walked voluntarily into a police station and spontaneously declared that he shot his half-brother. In response to the defendant's motion to suppress the statement, the court said that there is "no merit in the contention that a man's rights are denied because he walks into the nearest police station and blurts out a confession before police can warn him of his right to counsel or to remain silent." 43/

39/ Id. at 844.

40/ For a different result on similar facts, see Rosario v. Guam, supra, note 33.

41/ 382 F. 2d 158 (D. C. Cir. 1967).

42/ 287 F. Supp. 863 (W. D. Va. 1968).

43/ Id. at 865.

Several other spontaneous declarations made by arrested suspects in police custody have also been held admissible. In Stone v. United States, 44/ the defendant and a woman companion were stopped by police officers because of their use of a credit card. En route to the police station, while in custody, the woman was asked if the car the two were using was hers. At this point the defendant interrupted, saying that it was his car given him by his ex-wife. The car was later determined to have been stolen, and defendant was convicted under the Dyer Act. The Tenth Circuit ruled that his statement to the police, obviously made in part to protect his companion, was a volunteered statement given when he interrupted the conversation between the police officer and the woman. The court held that Miranda does not reach such a voluntary statement. In a similar case in the same circuit 45/ citing Stone as precedent, two defendants were stopped by police over a cashed check and were held in custody when it was determined that they were wanted by military authorities. The sheriff, wishing to move the defendant's car off the street, asked for the key, but the only key they produced would not unlock the car door. The sheriff then told one of the defendants they were giving him the runaround about the key. This defendant then admitted that the car was stolen. The sheriff testified that until that moment he had no idea it was stolen. The statement was ruled admissible on the grounds that it was volunteered and made in response to a question that concerned itself solely with moving the vehicle. The court stressed the fact that defendants were in custody on a charge of being AWOL and not on a charge of car theft.

In Anderson v. United States, 46/ the defendant and his female companion were arrested for bank robbery. On the way to headquarters, the officers began to question the female arrestee, and the defendant

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44/ 385 F. 2d 713 (10th Cir. 1967).

45/ Parson v. United States, 387 F.2d 944 (10th Cir. 1968). See also Pitman v. United States, 380 F. 2d 368 (9th Cir. 1968).

46/ 399 F. 2d 753 (10th Cir. 1968).

interjected saying, "She was at work when I pulled it." The officer asked, "Pulled what?", and the defendant responded, "The bank job." The court, citing Stone v. United States, 47/ held that the defendant's statements were voluntary admissions and that no interrogation of the defendant had preceded them. Therefore, Miranda warnings were held unnecessary. 48/

While the Anderson case may be near the borderline on the Miranda issue, the Sixth Circuit seems to go further in restricting the application of Miranda. In United States v. DeBose, 49/ an Alabama sheriff arrested one McIntosh in connection with a bank robbery. Without giving Miranda warnings, he questioned him as to the whereabouts of his confederate DeBose. McIntosh, while giving a series of possibilities as to DeBose's whereabouts, confessed. The court, pointing to the fact that the questioning did not relate to the bank robbery, found the statement to be volunteered.

It appears, therefore, that if a person voluntarily enters a law enforcement area, 50/ or if he is in custody but is not interrogated, or if the interrogation does not in any way relate to a

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47/ Supra, note 44.

48/ See also United States v. Bourassa, 411 F. 2d 69 (10th Cir. 1969); Smith v. Peyton, 295 F. Supp. 1379 (W. D. Va. 1968).

49/ 410 F. 2d 1273 (6th Cir. 1969).

50/ See United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967), for a contrary result.

crime, 51/ any statement he makes will be admissible despite the absence of Miranda warnings.

D. Statements to undercover agents, informers, or private citizens.

If the suspect is not aware that the person questioning him is a law enforcement officer, there is little likelihood that any statements made could be deemed coerced within the meaning of Miranda. This is particularly true if the suspect's state of mind is viewed as the controlling factor, as most reasoned opinions indicate it should. The cases seem to bear this out.

In United States v. Mitchell, 52/ the court upheld a perjury conviction which was based in part on the testimony of a fellow prisoner of the defendant. The court, noting that the government had not in any way prompted the prisoner to obtain information or furnish statements to government officials, stated that "This is simply a case of misplaced confidence." 53/

51/ It should be noted that Mathis v. United States, discussed infra, would clearly limit the use of the DeBose opinion to cases where the interrogation concerning matters very remote from any possible criminal action. In DeBose, the question was one any person might be asked whether or not he was a suspect or subject to any form of investigation. Asking the whereabouts of a third person could not normally lead to a criminal action. Thus, DeBose can be distinguished on its facts from Mathis.

52/ 417 F. 2d 1246 (7th Cir. 1969).

53/ Id. at 1249.

In *United States* v. *Fioravanti*, 54/ the *Miranda* problem is somewhat more complex. In that case, as in *Mitchell*, the defendant made admissions to a fellow prisoner. Unlike *Mitchell*, the testifying fellow prisoner turned out to be a government undercover agent who had been arrested with the defendant. The court found that this made no difference; the fact that the defendant thought he was talking to a compatriot negated the possibility of coercion. 55/

Custodial interrogation has also been found absent where private citizens detain a suspect at the direction of police officers by keeping him occupied until the officers can arrive to make an arrest. In *Yates* v. *United States*, 56/ the suspect had registered at a motel under a false name. The motel owners suspected the ruse and called the FBI. Agents told them to keep the suspect occupied. In doing so, the motel owners managed to get the suspect to execute two papers which were later used at his trial on a charge of impersonating an army officer. The court held that defendant was not in custody, nor was he being questioned by law enforcement personnel, and thus his statements and writings were admissible.

Finally, it is clear that custodial interrogation is not present in such situations as those where an agent is listening in on a phone with permission of one of the participants, 57/ or where an informer has hidden an agent in the trunk of his car before meeting the suspect. 58/ Claims that warnings are required in these cases are uniformly rejected.

54/ 412 F. 2d 407 (3rd Cir. 1969), cert. denied sub nom., *Panaccione* v. *United States*, 837 (1969).

55/ For similar reasoning, see *Groshart* v. *United States*, 392 F.2d 172, 178, n. 4 (9th Cir. 1968); *United States* v. *Small*, 297 F. Supp. 582 (D. Mass. 1969); *Johnson* v. *United States*, 369 F. 2d 949 (D. C. Cir. 1966); and *Davidson* v. *United States*, 411 F. 2d 75 (10th Cir. 1969).

56/ 384 F. 2d 586 (5th Cir. 1967).

57/ *Rogers* v. *United States*, 369 F.2d 944 (10th Cir. 1966); *United States* v. *Fiorillo*, 376 F.2d 180 (2d Cir. 1966).

58/ *Garcia* v. *United States*, 364 F. 2d 306 (10th Cir. 1966).

F. Statements by non-suspects

A person who is under no suspicion himself is unlikely to be questioned in such a situation as would induce a court to find the existence of custodial interrogation. In United States v. Delamarra,[59] a safe at a university had been opened and the contents stolen. The police were centering their investigation on those with knowledge of the combination. The defendant, who was a university guard, appeared on the campus to pick up his pay check. He was not under suspicion as he did not know the combination. He was, however, questioned as part of a routine interview of all employees who might have information concerning the theft. No warnings were given. The guard gave information implicating another guard in the theft. His story had discrepancies in it and, when questioned about them, he made a full confession of his own guilt. The officers involved later testified that they believed his story about the other guard and did not consider him a suspect until he confessed. The confession was ruled admissible, with the trial court holding that the defendant was at no time in custody. The court noted that the events took place on the defendant's employer's premises, that the defendant had come there freely, that he was never under suspicion himself until he made his confession, and that he was in no way deprived of his freedom. This would seem to be a far clearer case of general investigation than a case like Allen[60] where the investigation, even if still on the scene, had focused on one individual.

In Lamb v. United States,[61] two police officers responded to a call from hospital officials pertaining to the payment of a bill by the common-law wife of the defendant. Outside her room, one officer, not knowing the defendant's relationship to the girl and not suspecting him of any crime, asked him who the girl was. The defendant responded that she was a prostitute and that he had brought her into the state. The court held the statements admissible.

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[59] 275 F. Supp. 1 (D. D.C. 1967).

[60] Supra, note 25.

[61] 414 F. 2d 250 (9th Cir. 1969).

F. Administrative and tax investigations

Included in the decisions defining custodial interrogation are a series of income tax cases. Internal Revenue investigations usually begin with a civil investigation by a revenue agent. If he at any time suspects violations of a criminal nature he stops his investigation and turns the matter over to a special agent of the Intelligence Division. Rare is the taxpayer who will recognize that the difference between an agent and a special agent is the difference between a civil and a criminal investigation. The problem in such cases is ascertaining at what point, if any, *Miranda* warning must be given. It should be borne in mind that many such investigations take place in the taxpayer's home or office and that he often has his accountant and sometimes his lawyer present. Thus, the element of custodial interrogation associated with stationhouse activities is missing in these cases.

The vast majority of tax cases 62/ have held that, whether the investigation is civil or criminal in nature, no warnings are necessary. These cases hold that such investigative questioning does not fall within the *Miranda* definition of custodial interrogation. There is no deprivation of freedom when an Internal Revenue agent interviews a taxpayer.

62/ *Simon* v. *United States*, 421 F. 2d 667 (9th Cir. 1970); *United States* v. *Browney*, 421 F. 2d 48 (4th Cir. 1970); *Hensley* v. *United States*, 406 F. 2d 481 (10th Cir. 1968); *United States* v. *Brevik*, 422 F. 2d 449 (8th Cir. 1970); *Marcus* v. *United States*, 422 F. 2d 752 (5th Cir. 1970); *United States* v. *Squire*, 398 F. 2d 785 (2nd Cir. 1968); *Cohen* v. *United States*, 405 F. 2d 34 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969); *United States* v. *Miriani*, 422 F. 2d 150 (6th Cir. 1970); *Muse* v. *United States*, 405 F. 2d 40 (8th Cir. 1968), cert. denied, 393 U.S. 1117 (1969); *Mackiwicz* v. *United States*, 401 F. 2d 219 (2nd Cir. 1968), cert. denied, 393 U.S. 923 (1968); *Taglianetti* v. *United States*, 398 F. 2d 558 (1st Cir. 1968); *United States* v. *Caiello*, 420 F. 2d 471 (2nd Cir. 1969); *Spinney* v. *United States*, 385 F. 2d 908 (1st Cir. 1967), cert. denied, 390 U.S. 921 (1968); *Ping* v. *United States*, 407 F. 2d 157 (8th Cir. 1969), cert. denied, 395 U.S. 926 (1969); *United States* v. *Fidanzi*, 411 F. 2d 1361 (7th Cir. 1969); *United States* v. *Jernigan*, 411 F. 2d 471 (5th Cir. 1969); *United States* v. *Marcus*, 401 F. 2d 563 (2nd Cir. 1968); *Agoranos* v. *United States*, 409 F. 2d 833 (5th Cir. 1969), cert. denied, 396 U.S. 824 (1969); *United States* v. *White*, 417 F. 2d 89 (2nd Cir. 1969); *United States* v. *Charamella*, 294 F. Supp. 280 (D. Del. 1968).

A few decisions, however, have found Miranda warnings necessary in situations involving IRS investigative questioning. In United States v. Dickerson,[63] the court held:

> "Our conclusion is that Miranda warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division. We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind. Absent such warnings, the motion to suppress in the present case was properly granted.[64]"

In response to the government's contention that the absence of custodial detention or other indica of criminal prosecution negates the possibility of coercion, the court said:

> "Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings."

The court attempted to distinguish many of the cases which reached a contrary result, but nevertheless recognized that the decision was a departure from present law and gave it only prospective application except for the cases at bar.[65]

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[63] 413 F. 2d 1111 (7th Cir. 1969). See also United States v. Habig, 413 F. 2d 1108 (7th Cir. 1969), which is a companion case to Dickerson. A comprehensive list of pertinent federal cases covering IRS investigations can be found at footnotes 6 through 9 of the Dickerson opinion.

[64] 413 F. 2d at 1116-17.

[65] See id. at 1114-15.

One district court case on which the court in Dickerson relied was United States v. Turzynski.66/ There the court stated that once the government begins an investigation designed not to assess a tax deficiency but to develop evidence against a taxpayer for a possible criminal prosecution, it is encumbent on the investigating agents to warn the taxpayer of his constitutional rights, even though the taxpayer is not in custody or deprived of his freedom. The court would distinguish between questioning by a revenue agent and questioning by a special agent. The change from the Civil to the Intelligence Division of IRS was considered by the court to be as clear a point indicating that the adversary process had begun as the taking of the suspect into custody.

The Dickerson and Turzynski decisions must be considered judicial anomalies. The very premise of the Miranda decision is that it is formal custody or at least a significant deprivation of freedom of action that asserts a compulsive influence over a person. In most tax investigations this compulsion is simply not present.

A related problem has arisen from the fact that in October of 1967, the IRS directed its special agents to give a modified Miranda warning to taxpayers at their first interview where a full Miranda warning was not required. In United States v. Heffner67/, the defendant voluntarily submitted to an IRS interview after having been given a warning which did not accord completely with the warning set out in the 1967 directive. The court held that the agents' failure to follow the IRS warning procedure made the incriminating statements inadmissible under Accardi v. Shaughnessy, 68/ which requires a government agency to observe the rules it establishes. The court pointed out, "It is of no significance that the procedures or instructions IRS has established are more generous than the Constitution requires." 69/ This language indicates that the decision in no way supports the decision in Dickerson. 70/

Situations similar to those concerning IRS investigations have arisen in other fields. The results have been the same. Thus, statements made to Selective Service induction center clerks by persons refusing induction or service have been admitted in evidence although the statements had not been preceded by Miranda warnings. 71/ It has been held that

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66/ 268 F. Supp. 847 (N.D. Ill. 1967).

67/ 420 F.2d 809 (4th Cir. 1969).

68/ 347 U.S. 260 (1954).

69/ Supra, note 67 at 812.

70/ Supra, note 63.

71/ United States v. Holmes, 387 F. 2d 781 (7th Cir. 1968), cert. denied, 391 U.S. 936 (1968); Noland v. United States, 380 F. 2d 1016 (10th Cir. 1967), cert. denied, 389 U.S. 945 (1967); Pittman v. United States, 411 F. 2d 635 (10th Cir. 1969); United States v. Kroll, 402 F. 2d 221 (3rd Cir. 1968), cert. denied, 393 U.S. 1043 (1969).

statements made to a Selective Service Appeals board in an effort to get a conscientious objector classification are admissible although not preceded by *Miranda* warnings. 72/ However, in *United States* v. *Casias*, 73/ the court held *Miranda* warnings were necessary where the defendant was asked to bring in certain Selective Service forms to the local office. The request was found to have been made in a conscious effort to gather information to help determine whether a criminal charge for draft evasion was warranted, and thus is distinguishable on its facts from other draft cases.

Numerous other decisions concerning inquiries by various government agencies uniformly have held that no *Miranda* warnings are necessary prior to non-custodial questioning. 74/

In *Chavez-Martinez* v. *United States*, 75/ the defendant was asked by customs officers to enter their office while they searched her car. Another officer was told to watch her. The officers conducted a search pursuant to 19 U.S.C. 1582,which authorizes border searches, and discovered heroin. The court held that *Miranda* warnings "need not be given to one who is entering the United States unless and until the questioning agents have probable cause.... It is at that point, in border cases, that the investigation has 'focused' in the *Miranda* sense." 76/ In this case, the court found that statements made prior to the discovery of heroin were admissible without *Miranda* warnings, those made afterward were inadmissible without precedent *Miranda* warnings. 77/

72/ *United States* v. *Wagner*, 292 F. Supp. 1 (W.D. Wash. 1967); *United States* v. *Norman*, 301 F. Supp. 53 (M.D. Tenn. 1968).

73/ 306 F. Supp. 166 (D. Colo. 1969).

74/ *United States* v. *Webb*. 398 F. 2d 553 (4th Cir. 1968) (questioning concerning ICC violations by ICC agent in defendant's office); *F. J. Buckner Corp*. v. *NLRB*, 401 F. 2d 910 (9th Cir. 1968), cert. denied, 393 U.S. 1084 (1969) (questioning by NLRB field examiner concerning unfair labor practices); *United States* v. *Montez-Hernandez*, 291 F. Supp. 712 (E.D. Calif.1968) (questioning by immigration officials in routine check of nationality papers).

75/ 407 F. 2d 535 (9th Cir. 1969).

76/ *Id*. at 539.

77/ See also *United States* v. *De La Cruz*, 420 F. 2d 1093 (7th Cir. 1970).

In Mathis v. United States, 78/ the Supreme Court was presented with the issue of the need for Miranda warnings prior to questioning a person who was clearly in custody, but not in relation to the subject of inquiry at hand. 79/ In that case, the defendant was in a state prison for state offenses. Federal agents there questioned him regarding his civil tax liability without first giving him an adequate Miranda warning. The defendant's later Federal tax conviction was, in part, based on the prison interviews. The Court reversed the conviction, holding that Miranda applies to tax investigations where the taxpayer is in custody. The Court made it clear that the custody need not be based on the same offense on which the interrogation is centered; custody for any reason will suffice. It made no difference that the interviews concerned civil and not criminal matters. The important point was that the custodial interrogation could reasonably have been expected to lead to a criminal prosecution, which in fact it did. Mathis in no way changes the weight of authority that tax investigations do not amount to custodial interrogation unless, as noted above, a clear custodial situation is present. Mathis has received such an interpretation. 80/

As a result of Mathis, if there is the slightest chance that a criminal charge may result, Miranda warnings will be required any time a governmental agent interrogates a person who is in some form of custody, whether Federal, state, or local.

78/ 391 U.S. 1 (1968).

79/ See Green v. United States, 411 F. 2d 588 (10th Cir. 1969).

80/ White v. United States, 395 F. 2d 170 (8th Cir. 1968).

In United States v. Redfield,[81] the court, citing Mathis, held that statements made in response to questioning at a prison disciplinary hearing were inadmissible at the prisoner's trial for possession of marijuana because of the failure to give Miranda warnings. Such statements could still be used, of course, in administrative proceedings. For example, in Amtrek v. Clark,[82] the district court held no Miranda warnings need precede questioning by members of the parole board in a recommitment hearing regarding parole violations, pointing out that there was no criminal proceeding involved, and that Miranda only prohibits the use of statements in criminal proceedings.

II. ADEQUACY OF THE WARNING OF CONSTITUTIONAL RIGHTS.

The circuits differ on just how close the warnings administered by law enforcement officers must adhere to the specific requirements of Miranda. As outlined below, several circuits believe that the Miranda warnings need not be given with a ritual exactitude, while one circuit usually insists on a strict recitation of particular warnings.

The main conflict arises on the issue of whether a suspect must be warned not only of his right to have an attorney, but of his right to have the attorney present at the interrogation. Miranda states that "Prior to any questioning, the person must be warned . . . that he has a right to the presence of an attorney either retained or appointed."[83] The court also referred in the same paragraph to "other fully effective means"[84] of informing persons of their rights.

In Coyote v. United States,[85] the defendant, while in custody, was told that before making any statement he could consult a lawyer of his own choice, and that in the event he was without funds to hire a lawyer the judge would appoint or provide one for him. The defendant's subsequent statement was used against him at his trial. On appeal, the defendant claimed that the warning he received in effect told him that he could talk to a lawyer at that time only if he could afford one, and that court-appointed counsel would be provided only by the court at the time of trial. The Tenth Circuit rejected the defendant's claim by holding that Miranda "is not a ritual of words to be recited by rote according to didactic niceties."[86] Instead, the court stated, Miranda requires meaningful advice to the unlettered and unlearned in language that he can understand. The court said that the test is "whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights."[87] The court then held the warning as administered to be adequate.

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[81] 402 F. 2d 454 (4th Cir. 1968).

[82] 287 F. Supp. 208 (E.D. Pa. 1968).

[83] 384 U.S. at 444.

[84] Ibid.

[85] 380 F. 2d 305 (10th Cir. 1967), cert. denied, 389 U.S. 992 (1968). See also United States v. Berard, 281 F. Supp. 328 (D. Mass. 1968).

In Sweeney v. United States,[88] the defendant was arrested at an airport and taken to an airport **security** office. Prior to questioning he was told (along with other general warnings) that he was entitled to an attorney, that if he could not afford an attorney one would be appointed, and that he could use the telephone. After indicating that he understood his rights, the defendant made damaging admissions. He challenged his conviction on Miranda grounds, arguing that the warnings were defective because he was not explicitly told that he could consult an attorney before answering questions or that counsel could be present during questioning. The Ninth Circuit affirmed the conviction, finding that the substance of the required warnings was given. The reference to the right to counsel, immediately followed by a statement of the right to remain silent, would, in the court's view, make most people think this referred to the impending interrogation, particularly since appellant was told he could use the phone.[89]

In Keegan v. United States,[90] the Ninth Circuit dealt with the following warning: "You don't have to say anything without the presence of an attorney." The defense objected because the warning did not tell the defendant that he did not have to talk at all. The court rejected the defense contention and held that, while the warning could have been better phrased, it did tell the defendant in clear and unequivocal terms that he had the right to remain silent.[91]

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[86] 380 F. 2d at 308.

[87] Ibid.

[88] 408 F. 2d 121 (9th Cir. 1969).

[89] For a different result on somewhat similar facts, see United States v. Averall, 296 F. Supp. 1004 (E.D.N.Y. 1969).

[90] 385 F. 2d 260 (9th Cir. 1967).

[91] See Groshart v. United States, 392 F. 2d 172 (9th Cir. 1968), for a case where the Ninth Circuit found a failure to give the substance of the warning of the right to counsel.

In United States v. Vanterpool,[92] the Second Circuit was faced with a case where the defendant was not told specifically that he was entitled to the presence of his attorney when he was interrogated. He was, however, told of his right to consult with his attorney "at this time."[93] The court affirmed the conviction and held that the words of Miranda do not constitute a ritualistic formula which has to be repeated without change in order to be effective. Like the Tenth Circuit, all that the court would require are words that convey the substance of the warnings, which the warnings given here were found to do. One member of the panel dissented on the adequacy of the instant warning, stating that Vanterpool was not informed of his right to have a lawyer present when interrogated and that such a warning is an absolute requirement of Miranda.

In a subsequent Second Circuit case,[94] the court cited Vanterpool for the proposition that no specific words are necessary to satisfy Miranda as long as the substance of the warning is given. However, in applying this principle to the case then before it, the court strictly interpreted what is necessary to convey the substance of the warning to the accused. The defendant was told that he did not have to make a statement, which the court found to have been an inadequate warning of his right to remain silent. The defendant was told that "he could consult an attorney prior to any question,"[95] which the court found inadequate to inform the defendant that he could have an attorney present during any interrogation. Finally, the defendant was not advised of his right to a court-appointed attorney, a matter noted by the court even though there was no indication that the defendant was prejudiced since he was not indigent and had retained counsel throughout his trial and appeal.[96] The decision seems to take a narrow view of what constitutes substance under Vanterpool, particularly since in that case a statement that the defendant could consult his attorney "at this time" was held sufficient, and in this case the statement that he could consult an attorney prior to any question was deemed insufficient. However, on the whole the Vanterpool warnings were more complete and the two cases are not in direct conflict.

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[92] 394 F. 2d 697 (2nd Cir. 1968).

[93] Id. at 699.

[94] United States v. Fox, 403 F. 2d 97 (2nd Cir. 1968).

[95] Id. at 100.

[96] See Judge Moore's dissent at 403 F. 2d 105; see also the cases cited in notes 99 and 100, infra.

The Fifth Circuit has taken a particularly strict view in assessing the adequacy of warnings. In Windsor v. United States, 97/ the Fifth Circuit held that merely telling a defendant in custody that he could speak with an attorney or anyone else before he said anything was insufficient to meet Miranda's requirements. Instead he must be told that he has a right to the presence of an attorney during interrogation and that one will be appointed for him if he cannot afford one. The Fifth Circuit reiterated this holding in Montoya v. United States, 98/ where the defendant was told she had a right to an attorney, and, if she could not afford an attorney, one would be provided for her. The court found this warning to be insufficient and, to support its decision, quoted at length from the Supreme Court's opinion in Miranda, including the language that made the warning of the right to consult with a lawyer and to have the lawyer present during questioning "an absolute prerequisite to interrogation." 99/ The court held that the warning given in this case failed to meet this "absolute prerequisite." Also, in Atwell v. United States, 100/ the Fifth Circuit held that advising a suspect that he was entitled to consult with an attorney at any time did not meet the Miranda requirement that a suspect be advised that he could have a attorney with him during questioning.

97/ Supra, note 9. The Fifth Circuit reached the same conclusion on the warning that "if he did not have any money to obtain an attorney . . . the judge, would appoint one for him when he went to court." This was held defective because it did not advise him of the right to have court-appointed counsel present during the interrogation. Fendley v. United States, 384 F. 2d 923 (5th Cir. 1967).

98/ 392 F. 2d 731 (5th Cir. 1968). See also Lathers v. United States, 396 F. 2d 524 (5th Cir. 1968).

99/ 384 U.S. at 471, cited in 392 F. 2d 731 at 734. See also Brown v. Heyd, 277 F. Supp. 899 (E.D. La. 1967).

100/ 398 F. 2d 507 (5th Cir. 1968).

In *Green* v. *United States*, 101/ a Tenth Circuit case, the defendant while in state custody was questioned by federal authorities but was not advised that if he could not afford an attorney one would be appointed. The court said, "Such a warning now appears to be a necessary inclusion." 102/ The decision is not necessarily in conflict with the court's prior decision in *Coyote* 103/ since, unlike the situation in that case, the defendant here was not made aware of his right to appointed counsel at all. In *Coyote*, the challenge rested on the particular words used to inform him of this right.

As to the right to court-appointed counsel, the Court in *Miranda* had stated in a footnote that this particular warning need not be given to a person who is known to have an attorney or who is known to have ample funds to procure one. 104/ Consequently, it has been suggested that the failure to warn of this particular right is harmless error if the suspect declares that he does not want a lawyer or if there is no showing of indigency. 105/ When it appears in fact that the defendant could have hired his own lawyer, the failure to warn him of his right to court-appointed counsel has been disregarded. 106/ In *United*

101/ 411 F. 2d 588 (10th Cir. 1969). This decision overturns an earlier decision in *Green* v. *United States*, 386 F. 2d 953. Two of the three judges were on the earlier panel.

102/ 411 F. 2d at 589.

103/ *Supra* note 85.

104/ 384 U.S. at 473, n. 53.

105/ *United States* v. *Knight*, 261 F. Supp. 843 (E. D. Pa. 1966); *United States* v. *Fisher*, 387 F. 2d 165 (2d Cir. 1967), cert. denied, 390 U.S. 953 (1968).

106/ *United States* v. *Lubitsch*, 266 F. Supp. 294 (S.D.N.Y. 1967).

States v. *Miller*, [107] however, the defendant's statements were suppressed where he had first been questioned by local authorities who failed to warn him of his right to remain silent and his right to court-appointed counsel, and had later been questioned by FBI agents who had warned him of all his rights except for his right to court-appointed counsel. The court found it significant that, when warned of this particular right by a United States Commissioner, the defendant immediately requested court-appointed counsel.

The Second Circuit has found it necessary to reverse a conviction where the wording of the warning failed to inform the defendant of the substance of the rights enumerated by *Miranda*. In *United States* v. Mullings, [108] the defendant was warned not that he had a "right to remain silent," [109] but "that he had a constitutional right not to answer any . . . questions if he felt that the answers to those questions would in any way incriminate him." [110] The Second Circuit deemed this an insufficient warning under *Miranda*, holding that a suspect has to be told that he has a right to remain silent, not just that he can withhold incriminating statements. The possibly misleading nature of this advice distinguishes the cases in which the same circuit has held that no fixed formula need be used as long as a suspect is informed of the substance of his rights.

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[107] 261 F. Supp. 442 (D. Del. 1966).

[108] 364 F. 2d 173 (2d Cir. 1966).

[109] 384 U.S. at 444.

[110] *Supra*, note 108 at 175.

In Craft v. United States, 111/ the defendant argued that he should have been told that statements made "would be used against him" rather than statements made "could be used against him". The Ninth Circuit held that the defendant had been sufficiently warned of his rights.

Various challenges that additional information has detracted from the substance of Miranda warnings have generally failed. The courts have held that a warning to tell the truth was not error, 112/ and that a reference to a distant federal defender program did not negate a statement of advice as to appointed counsel. 113/ Also, in Klingler v. United States, 114/ where the defendant was told in addition to the standard Miranda warning that the warning meant "that you do have the right to have an attorney appointed by the court for you if you are later charged with a federal offense," 115/ the court held that truthfully informing the defendant that an attorney would not be furnished until federal charges were brought did not vitiate the warning. 116/

111/ 403 F. 2d 360 (9th Cir. 1968).

112/ Rivers v. United States, 400 F. 2d 935 (5th Cir. 1968).

113/ De La Fe v. United States, 413 F.2d 543 (5th Cir. 1969).

114/ 409 F. 2d 299 (8th Cir. 1969).

115/ Id. at 308.

116/ See also Mayzak v. United States, 402 F.2d 152 (5th Cir. 1968).

Efforts to expand upon the warnings required by Miranda have been unsuccessful. Thus, courts have held that there is no requirement that a defendant be told the possible punishment for the suspected crime, 117/ that he be told that he is the subject of an investigation, 118/ or that he be told of his rights orally if he is literate and has been given a written warning of his rights. 119/ Similarly, it has been held that a suspect need not be urged to consult with an attorney prior to questioning. 120/

Also, in Caton v. United States, 121/ where a fully-warned defendant who elected to remain silent was subsequently overheard making damaging statements to a co-defendant, the Eighth Circuit held that suspects need not be warned that conversations with persons other than law enforcement personnel could be used against them.

117/ United States v. Hall, 396 F. 2d 841 (4th Cir. 1968).

118/ United States v. Fayette, 388 F. 2d 728 (2nd Cir. 1968).

119/ Bell v. United States, 382 F. 2d 985 (9th Cir. 1968), cert. denied, 390 U.S. 965 (1968).

120/ United States v. Dowells, 415 F. 2d 801 (9th Cir. 1969).

121/ 407 F. 2d 367 (8th Cir. 1969).

It has also been held that if the defendant signs a written statement that contains an incomplete Miranda warning, testimony that the complete warnings were administered orally prior to the statement is admissible to cure this defect. 122/

The Federal Bureau of Investigation is currently using a warning (and waiver) form which includes all the warnings required by Miranda and which has received judicial approval. 123/ The form is attached to this memorandum as Appendix A.

III. EFFECTIVENESS OF A WAIVER OF CONSTITUTIONAL RIGHTS.

Miranda states that a defendant may waive his rights provided that the waiver is made "voluntarily, knowingly and intelligently." 124/ It also states that a "heavy burden" 125/ rests on the government to prove that a waiver meets this test. Next to the area of custodial interrogation, this is the area that has generated the largest amount of case law. In most such cases, the federal courts have found the government's burden successfully met.

122/ Sanders v. United States, 396 F. 2d 221 (5th Cir. 1968). The defendant here raised the parol evidence rule, but the court confined that rule to consensual contractual problems of commercial law.

123/ Hodge v. United States, 392 F. 2d 552 (5th Cir. 1968); United States v. Wallace, 272 F. Supp. 841 (S.D.N.Y. 1968).

124/ 384 U.S. at 444.

125/ Id. at 475.

A. Form of the waiver.

Common problems in this area concern the manner in which a waiver has been manifested. Federal courts accept both oral 126/ and written waivers 127/ routinely. The fact that the defendant has signed a written waiver has generally been enough to meet the government's burden. 128/ In Frazier v. United States, 129/ however, a signed waiver was found impeached by the fact that the defendant, when questioned, indicated that while he wished to confess he did not want the interrogator writing his statement down. The court of appeals, suggesting that the defendant may have been under the misapprehension that only written statements could be used against him in court, remanded the case to the district court for a hearing on the validity of the waiver.

Most cases in this area are concerned with the validity of oral waivers. The following oral waivers have been upheld when they followed complete Miranda warnings: "I might as well tell you about it."; 130/ "I don't have nothing to hide. I will answer anything within reason."; 131/ "I stole the car in Los Angeles; what else is there to talk about?"; 132/ "I don't want one." 133/

126/ Tucker v. United States, 375 F. 2d 363 (8th Cir. 1967); see Jordan v. United States, 421 F. 2d 493 (9th Cir. 1970).

127/ United States v. Doyle, 373 F. 2d 875 (2d Cir. 1967); United States v. Montos, 421 F. 2d 215 (5th Cir. 1970).

128/ United States v. Hall, supra, note 117; United States v. Goldsmith, 274 F. Supp. 494 (E. D. Pa. 1967). See United States v. Fitzpatrick, 289 F. Supp. 767 (N.D. Utah 1968). See also cases cited in note 127, supra.

129/ 419 F. 2d 1161 (D.C. Cir. 1969).

130/ United States v. Boykin, 398 F. 2d 483 (3d Cir. 1968), cert. denied, 393 U.S. 1032. (1969)

131/ Keegan v. United States, 385 F. 2d 260 (9th Cir. 1968).

132/ Daro v. United States, 380 F. 2d 23 (10th Cir. 1967).

133/ Tucker v. United States, supra, note 126.

Some courts have rejected like-worded waivers, but in each case there were special factors leading to the rejection. In Brown v. Heyd, [134] the court found insufficient the defendant's statement "I know all of that", [135] where the statement followed an incomplete Miranda warning. The court stated that it must first be shown that knowledge of the rights existed before they can be found to have been waived. In Low v. United States, the defendant said "All right" after a complete warning. This was held insufficient to demonstrate a knowing waiver. A major factor in the Low decision, however, was the defendant's unrebutted claim that he had been told he would "go to jail . . . that morning" [137] if he said nothing and that he had been promised leniency if he talked.

In Schenk v. Ellsworth, [138] the defendant was booked and jailed on suspicion of murder. He was approached by the county attorney in his cell, was told that he wished to question him "in connection with the shooting incident of his wife", [139] and was given Miranda warnings. The defendant stated that he "didn't think he needed an attorney at this time," [140] and made an oral statement. Subsequently, when the county attorney returned for a written statement, the defendant asked whether the county attorney thought he needed an attorney. The county attorney responded by saying that it was a serious matter and that his need for an attorney was up to him. The district court subsequently found that, since the defendant was never told that he had been booked on suspicion of murder, there was no effective waiver. "Certainly it stands to reason that a suspect cannot intelligently make the decision as to whether he wants counsel if knowledge of the crime suspected is withheld from him." [141]

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[134] 277 F. Supp. 899 (E.D. La. 1967).

[135] Id. at 905.

[136] 257 F. Supp. 606 (W.D. Pa. 1966).

[137] Id. at 609.

[138] 293 F. Supp. 26 (D. Mont. 1968).

[139] Id. at 27.

[140] Id. at 27.

[141] Id. at 29.

As a general rule, silence alone will not be found to constitute a valid waiver. 142/ However, silence plus certain added factors has been held to amount to a waiver. In *United States* v. *Hayes*, 143/ the defendant received a complete warning but in no way manifested that he understood the warning or that he did or did not desire counsel. After the warning, and prior to any interrogation, Hayes asked for and was granted permission to make a telephone call. Upon returning from the call he was asked leading questions to which he made incriminating responses. The questioning ceased after thirty minutes when the defendant refused to go on without consulting an attorney. The Fourth Circuit refused to hold that just because there was no express statement from the defendant it follows that there could be no waiver. The court pointed out that when *Miranda* discussed the government's heavy burden in establishing waiver, reference was made to the holding in *Johnson* v. *Zerbst* 144/ that an intelligent waiver depends on the particular facts and circumstances of each case, including the background, experience, and conduct of the accused. The court in *Hayes* stated that while silence followed by grudging answers to leading questions in a police station is insufficient alone to establish a waiver, there were additional factors present in this case--the defendant was physically healthy and alert, he was given full warnings, he was allowed to use the telephone freely, he was not subjected to psychological pressures, and he was not questioned further after he had refused to answer additional inquiries. The court also pointed to the defendant's intelligence which was evidenced by the "poise and cunning"145/ he displayed in committing the crime charged. It is hard to envision a more limited group of additional factors than those present in *Hayes*.

In another case, *United States* v. *Corbbins*, 146/ the defendant received a full warning and said that he understood his rights. He told an agent that he did not want an attorney present during the interrogation and that he wished to proceed without one, but that he wanted one appointed for his hearing before the Commissioner. The Seventh Circuit held that the defendant's indication that he did not want an attorney prior to the hearing was enough to constitute an effective waiver.

142/ *Moore* v. *United States*, 401 F. 2d 533 (9th Cir. 1968).

143/ 385 F. 2d 375 (4th Cir. 1967), cert. denied, 390 U.S. 1006 (1968).

144/ 304 U.S. 458 (1938).

145/ 385 F. 2d at 378.

146/ 397 F. 2d 790 (7th Cir. 1968), cert. denied, 393 U.S. 1068 (1969).

Even an affirmative statement indicating a waiver, as in Corbbins, may not be sufficient if the suspect is not made aware of the charges as in Schenk, 147/ or if his physical condition renders him incapable of waiver. For example, in United States ex rel Colbins v. Maroney, 148/ a murder suspect, who was a heavy drug user, was questioned for several hours during which he was undergoing narcotic withdrawal symptoms. The district court, without reaching the issue of whether the petitioner had been promised a doctor if he gave a statement, held that his condition alone rendered his confession involuntary. He was, as the court saw it, simply incapable of a valid waiver.

The strictest interpretation to date of what is required to meet the government's burden of establishing waiver appears in the Tenth Circuit's opinion in Sullins v. United States. 149/ There four defendants, who were arrested on forgery charges, were given Miranda warnings several times after which they all made statements. At no time, however, did any of the four expressly say that he did not want to consult an attorney before making a statement. The court held this to be fatal to the admissibility of the inculpatory statements, citing the heavy burden placed on the government by Miranda and the statement in Miranda that a waiver is never to be presumed simply from the failure to ask for counsel. 150/ One member of the panel concurred in the finding that no waiver had been shown, but disagreed with the suggestion in the majority opinion "that an express declination of the right to counsel is an absolute from which, and only from which a valid waiver can flow". 151/ The dissenting judge pointed out that Miranda states that declination followed closely by a statement "could" constitute a waiver. While most decisions to date require some outward manifestation to be evidenced, none but Sullins can be read to require express declinations of specific rights for an effective waiver.

147/ Supra, note 138.

148/ 287 F. Supp. 420 (E.D. Pa. 1968).

149/ 389 F. 2d 985 (10th Cir. 1968).

150/ 384 U.S. at 470.

151/ 389 F. 2d 985 at 989 (Lewis, J. concurring).

B. Waivers by persons represented by counsel.

Another problem that has arisen concerns statements taken from defendants who have retained counsel but whose attorneys are not present at the interrogation. It has been clearly held that the mere fact that retained counsel is not present at the interview does not by itself render any statements made inadmissible. 152/ If one can waive the right to the presence of counsel when it first attaches, it has been held that one can also waive this right subsequent to the appointment or retention of counsel. 153/

Despite the logic of this principle the courts are troubled by such waivers. The Seventh Circuit in United States v. Smith, 154/ dealt with a case where exculpatory statements were made in the absence of the defendant's court-appointed attorney. Since the trial took place before Miranda was decided, the case was not governed by Miranda. Nevertheless, the court took pains to discuss the effect of Miranda on similar situations in the future. While not stating that such statements would be barred, the court did state that the Miranda rule "applies with greater force to preclude . . . statements resulting from in-custody interrogation after known retainer or appointment of counsel and without counsel's presence or approval, unless it very clearly appears that the accused deliberately and understandingly chose to forego the assistance of counsel at such interrogation." 155/

The Seventh Circuit has had two occasions since Smith to deal with similar cases, one leading to a reversal. In United States v. Nielsen, 156/ the defendant, after a full warning, refused to sign a waiver until he consulted with his lawyer. The agents offered to permit him to call his attorney,

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152/ Jordan v. United States, 421 F. 2d 493 (9th Cir. 1970); Dillon v. United States, 391 F. 2d 433 (10th Cir. 1968); Wilson v. United 398 F. 2d 331 (5th Cir. 1968). In Wilson, the defendant was represented by appointed counsel.

153/ Ibid.

154/ 379 F. 2d 628 (7th Cir. 1967), cert. denied, 389 U.S. 993 (1967).

155/ Id. at 633.

156/ 392 F. 2d 849 (7th Cir. 1968).

but the defendant said it could wait until later and said that the agents "could proceed with the questioning." 157/ Five questions were asked, and defendant's answers were subsequently used against him at trial to show his consciousness of guilt. The court reversed, and, after citing the standard set out in Smith, held that the defendant's statements adopted contradictory positions and should have alerted the agents. The agents, said the court, should have made further inquiries to determine if his apparent change of position was the product of intelligence or of confusion. In United States v. Hale, 158/ the defendant's attorney advised him to talk to the FBI and he did so without his counsel's presence. The Seventh Circuit distinguished Nielsen because there was, under the facts in Hale, no chance for confusion.

In Coughlin v. United States, 159/ FBI agents, who were aware that the defendant had an attorney, visited him in jail without informing the attorney. A warning was administered and an oral waiver obtained. Coughlin then confessed. On appeal it was claimed that no waiver can be truly voluntary unless counsel was present to advise the client. The Ninth Circuit rejected this contention as an unwarranted extension of Miranda and found that a valid waiver had been made. The court, however, expressed dissatisfaction with the practice of interviewing a prisoner alone after he has retained counsel. 160/ The Fifth Circuit also has encouraged the ceasing of questioning whenever the defendant states that he has a retained attorney to agents who were previously unaware of that fact, 161/ and the Second Circuit has affirmed a district court's disapproval of an attempted interviewing of a defendant whose counsel specifically requested that the interrogation of his client cease until he arrived. 162/

157/ Id. at 851.

158/ 397 F. 2d 427 (7th Cir. 1968), cert. denied, 393 U.S. 1067 **(1969)**.

159/ 391 F. 2d 371 (9th Cir. 1968).

160/ Judge Hamley dissented in Coughlin and wrote a lengthy opinion in which he criticized this practice as reversible error. He also stated his opinion that this practice, when sanctioned by prosecutors, **violates Canon 9 of the Canons of Professional Ethics.**

161/ Misner v. United States, 384 F. 2d 130 (5th Cir. 1967).

162/ United States ex rel Magoon, 416 F. 2d 69 (2nd Cir. 1969). While this decision is based on Escobedo, it clearly has equal relevance to Miranda situations. See United States ex rel Magoon v. Reincke, 304 F. Supp. 1014,1019 (D. Conn. 1968).

C. Oral waivers following refusals to sign a written waiver.

Another problem that has arisen over waivers concerns those defendants who express a willingness to talk but who refuse to sign anything. No majority opinion has yet discussed the possibility that such a defendant is confused as to the admissibility of an oral statement as opposed to a written one, although such a factor could well affect the voluntariness of a waiver. 163/

As a rule, the decisions indicate that absent special circumstances the refusal to sign a waiver does not, of itself, negate an otherwise evidenced waiver. 164/ For example, in Auger v. Swenson 165/ the sole issue was whether interrogation could continue after the habeas corpus petitioner refused to sign a written waiver. When the petitioner was asked to sign, following full warnings, he responded that his attorney told him "never to sign anything." 166/ He indicated, however, that he did not mind talking about the matter, and he freely discussed it. The court found there was a valid waiver and dismissed the petition.

It is clear, however, that a refusal to sign a written waiver in some circumstances **renders** a statement inadmissible. For example, in United States v. Bird 167/ the court noted this as a factor in granting the defendant's motion for acquittal despite her oral admissions. Other contributing factors were that she was a poorly educated Indian, she had been drinking heavily the night before, she had little or no sleep during the previous day, she had indicated prior to her admissions that she did not

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163/ See dissent of Judge Friedman in United States v. Ruth, 394 F. 2d 134 (3rd Cir. 1968).

164/ See Pettyjohn v. United States, 419 F. 2d 651 (D.C. Cir. 1969); United States v. Jackson, 287 F. Supp. 80 (D. Conn. 1968), affirmed, **390 U.S. 570 (1968); United States v. Ruth, 394 F. 2d 134 (3d Cir. 1968);** Coughlin v. United States, supra, note 159; Love v. United States, 386 F. 2d 260 (8th Cir. 1967), cert. denied, 390 U.S. 985 (1968); Keegan v. United States, supra, note 131; United States v. Burley, 280 F. Supp. 672 (D. Del. 1968); United States v. Thompson, 417 F. 2d 196 (4th Cir. 1969). See also Klingler v. United States, 409 F. 2d 299 (8th Cir. 1969).

165/ 302 F. Supp. 1131 (W.D. Mo. 1969).

166/ Id. at 1134.

167/ 293 F. Supp. 1265 (D. Mont. 1968).

wish to continue the interview, and she had submitted to questioning (she testified) because she "thought maybe I had to." 168/

In cases 169/ where a written waiver is refused, it appears the courts will consider all the circumstances surrounding the admissions, including the atmosphere, the length of interrogation and the intelligence and mental condition of the suspect. Generally the courts have not found the refusal to sign determinative.

D. Waivers by juveniles.

A few cases have been concerned with the problem of obtaining a waiver from a juvenile. In Lopez v. United States, 170/ a sixteen year old Indian boy was visited in his home by FBI agents. They talked to him only after receiving permission from the boy's mother. The boy was given the FBI warning form, which he read aloud, discussed with his mother, and, at the agents request, explained it to them in his own words. When he had trouble with the word "coercion" they explained its meaning to him. The boy then signed the waiver form and made a damaging admission. The waiver was upheld by the Ninth Circuit in the face of a claim that the defendant's age raised an inference of incapacity to waive counsel which the government had failed to overcome. The court stated that, on the facts presented in the record, the defendant understood his rights and intelligently waived them.

The issue in West v. United States 171/ was whether, granting a perfect Miranda warning, a 16 year old was necessarily incapable of a valid waiver. The court held that age alone does not preclude the possibility of a valid waiver; fundamental fairness and due process will be examined. The defendant in West had been fully informed of his rights, he had a 10th grade education, he lived as an adult away from home, he was not held incommunicado, he was permitted visits by his parents, and no deceit or persuasion was used. In these circumstances, the court found the waiver valid.

168/ Id. at 1275

169/ See cases at notes 164-167.

170/ 399 F. 2d 865 (9th Cir. 1968).

171/ 399 F. 2d 467 (5th Cir. 1968). See also Rivers v. United States, 400 F. 2d 935 (5th Cir. 1968).

IV. PROCEDURAL ISSUES RELATING TO WARNINGS AND WAIVERS.

In *Miranda*, the Court stated:[172] "Unless and until such warnings and waiver are demonstrated by the *prosecution* at trial, no evidence obtained as a result of interrogation can be used against [the defendant]."[173] It is clear, however, that while the government carries a heavy burden in making such a demonstration, testimony by law enforcement officers is alone sufficient to meet this burden.[174]

A concession of the issue by the defense at trial will, of course, relieve the government of the necessity of proceeding with such a demonstration. In *Application of Reynolds*,[175] the Third Circuit, in denying habeas corpus relief from a death sentence imposed following a murder conviction, held that the defendant's counsel, who as a matter of trial tactics had acknowledged the voluntariness of the defendant's confessions, had "deliberately, unequivocally, and reasonably waived any objections to such confessions and their admission into evidence."[176] Moreover, short of a concession, a simple failure of the defense to raise the issue either directly or indirectly will obviate the need for the government to prove that an adequate warning and waiver preceded the admissions submitted. In *United States ex rel Snow* v. *Illinois*,[177] the district court went a step further, stating: "In the absence of a charge by petitioner of any evidence to the contrary, this court presumes as a matter of law that States Attorney John B. Anderson carried out his duties in a lawful manner and advised petitioner of his constitutional right to remain silent and to confer with an attorney before making any statement."[178] However, in *United States ex rel Hurston* v. *McGrath*[179] the court granted a habeas corpus petition saying that despite the failure of the defense to raise a Miranda issue, "it should still be open to petitioner to claim that there was no intentional waiver of her rights." 180/ It should be noted, though, that there were special circumstances in the case which probably had an influence on the decision; the defendant's counsel had only a brief conversation with her before trial, he did not ask her about statements made to the police, the information did not mention her admissions, **there was** little other evidence against the defendant, and she had raised on appeal the issue of the adequacy of her legal representation.

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[172] **384 U.S. at 479 (emphasis added).**

[173] In *Morgan* v. *United States*, 405 F. 2d 497 (5th Cir. 1968), it was held that there is no requirement that there be an affirmative determination that a defendant understood the *Miranda* warnings which concededly were given.

[174] See *United States* v. *Ogle*, 418 F. 2d 239 (5th Cir. 1969); *United States ex rel Pendergrass* v. *Anderson*, 304 F. Supp. 577 (D. Del. 1969).

[175] 397 F. 2d 131 (3rd Cir. 1968).

[176] *Id.* at 134.

[177] 299 F. Supp. 471 (N.D. Ill. 1969).

[178] *Id.* at 473.

[179] 289 F. Supp. 1 (E.D.N.Y. 1968).

Consequently, in the absence of compelling reasons for excusing the defense from raising a Miranda challenge, failure to raise the issue prior to verdict will constitute a waiver of the issue.

Rule 12(b)(1) of the Federal Rules of Criminal Procedure permits the defendant to raise a Miranda challenge in a pre-trial suppression motion. The issue may, however, be raised for the first time at trial. If the defense waits until the trial to raise the issue, there generally must be an independent determination of the matter outside the presence of the jury in order to assure that the jury is not influenced by an admission or confession which is found to be inadmissible. A holding of such a hearing in front of the jury, while inadvisable, will not necessarily constitute prejudicial error. In Pinto v. Pierce, 181/ the district court 182/ and the court of appeals 183/ held that the hearing must be conducted outside the presence of the jury and failure to do so violates due process. The Supreme Court reversed, saying:

> "This court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of circumstances. Jackson v. Denno, 378 U.S. 368 (1964), held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. A confession by the defendant found to be involuntary by the trial judge is not to be

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180/ Id. at 2.

181/ 389 U.S. 31 (1967).

182/ 259 F. Supp. 729 (D.N.J. 1966).

183/ 374 F. 2d 472 (3rd Cir. 1967).

> heard by the jury which determines guilt or innocence. Hence, because a disputed confession may be found involuntary or inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury." 184/

V. USE OF STATEMENTS OBTAINED IN VIOLATION OF MIRANDA TO IMPEACH A DEFENDANT'S TESTIMONY.

/Editorial note:/

This section as originally printed by the Department of Justice discussed the decisions of the various Courts of Appeals which had considered this question, there having been no Supreme Court case on the subject. Since then, the Supreme Court has settled the question by its decision in Harris v. New York, which held that even if a statement is inadmissible in the prosecution's case in chief because it did not fulfill the requirements of Miranda, it may still be used to impeach credibility if the defendant takes the stand in his own behalf. 185/

VI. EFFECT OF STATEMENTS OBTAINED IN VIOLATION OF MIRANDA ON SUBSEQUENT STATEMENTS.

/Editorial note:/

In view of our editorial change in Section V., which required deletion of footnotes in that section, we have had to take the slight additional liberty of changing the numbers of the footnotes in this section.

In Westover v. United States, 186/ a suspect in a city jail was properly warned and questioned by FBI agents immediately after a fourteen-hour local police interrogation prior to which no adequate warning had been given. Westover's confession to the FBI agents was ruled inadmissible because the situation amounted to an interrogation for a continuous period with no warning before the start of the questioning. However, the Supreme Court made it clear that federal officers are not precluded from questioning a suspect just because he has been held for some time by other authorities and interrogated by them without proper warnings. The Court

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184/ Supra, note 181, at 32. See also United States v. Russo, 399 F. 2d 75 (4th Cir. 1968), where the court held that the Fourth Circuit's normal rule requiring an independent hearing on the issue of the voluntariness of a confession need not have been followed where the defendant took the stand and duplicated the agent's testimony as to the circumstances surrounding an admission.

185/ U.S. (1971)

186/ 384 U.S. 436 (1966). Westover is a companion case to Miranda.

stated that a different situation "would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 187/

The first major case to discuss Westover was Evans v. United States. 188/ The defendant was charged with robbing a jewelry store that doubled as a post office. Local police, without adequately warning the defendant, interrogated him at length and obtained a confession. Three days later a postal inspector interrogated Evans in the presence of the same local officer who had obtained the earlier confession, and Evans again confessed. The court indicated doubts as to the adequacy of the warnings administered by the postal inspector, but based its holding on a violation of Westover principles. Although the interrogation was removed in time from the earlier interrogation, other factors were present. Evans had been interrogated by local officers on and off for three weeks before confessing. In addition, Evans was questioned by the federal agents about the same crime that he had already admitted to local authorities. (In Westover the FBI had interrogated the defendant about a separate matter). The clinching factor was the presence of the local official to whom Evans had already confessed. The court thus held that the confession obtained by the postal inspector was "tainted and infected" by the poison of the prior, concededly unconstitutional confession obtained by the local officer). 189/ The court, however, emphasized that its decision was to be limited to the facts of the case, and was not to be interpreted as a rule barring law enforcement officials of one jurisdiction from questioning a suspect interrogated by other officials without proper warnings.

In Harney v. United States, 190/ the defendant made a full confession to local police after defective Miranda warnings. Subsequently, an FBI agent gave the defendant an adequate warning and he signed a waiver and again confessed. The Fifth Circuit reversed the conviction, finding that the latter confession was tainted by the former. The court noted that all the questioning took place in the same police station, that the FBI agent was aware of the earlier confession, and that from the defendant's point of view the warning came near the end of his interrogation.

In other cases that have presented Westover problems the courts have been able to affirm the convictions. The simplest problem arises when

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187/ 384 U.S at 496.

188/ 375 F. 2d 355 (8th Cir. 1967).

189/ Id. at 361. See also Gilpin v. United States, 415 F. 2d 638 (5th Cir. 1969).

190/ 407 F. 2d 586 (5th Cir. 1969). See United States v. Pierce, 397 F. 2d 128 (4th Cir. 1968), in which the Fourth Circuit reaches the same result on similar facts.

the defendant objects to the admission of a confession to federal agents solely because it had been preceded by a period of detention by local police. In Bell v. United States, 191/ the defendant argued that before a federally obtained confession can be admissible, the government must prove that the Miranda warnings were administered at the time of the arrest. The court rejected this argument, holding that federal officers are not accountable for the actions of local officials until they begin to operate in concert with them. In Bell, no evidence was offered of any act or statement of the defendant prior to his interrogation by the federal officers. 192/ Similarly, there has been held to be no taint if the local officials interrogated the defendant solely about local offenses with none of the other factors of Westover present. 193/

In Jennings v. United States, 194/ the defendant received a full warning from local police and refused to say anything to them. Within an hour, an FBI agent arrived and, unaware of the defendant's prior refusal to talk, repeated the warnings to the defendant. The defendant changed his mind and made a full statement to the federal agent. On appeal the court found that the situation in Jennings differed considerably from that in Westover. Stress was placed on the earlier proper warning and on the cessation of the questioning by the local police after the defendant had refused to talk.

In Mapys v. United States, 195/ the defendant was arrested by local police on suspicion of murder. After being advised of his rights, he refused to be questioned until he saw a lawyer. Later that day he was again advised of his rights at a hearing on probable cause, and he again requested an attorney prior to questioning. He was subsequently questioned by local police without adequate warnings, and made an exculpatory statement. Three days later, upon requesting permission to obtain his clothing from his car, he was met by FBI agents and given full Miranda warnings. Without questioning, the defendant stated that the car was the one in which he had come to town. The following day, on his own volition, he made a statement exculpating his brother. 196/ The court held the latter two statements were not tainted by the statement to local police.

191/ 383 F. 2d 985 (9th Cir. 1967).

192/ See Moll v. United States, 413 F. 2d 1233 (5th Cir. 1969).

193/ Nobles v. United States, 391 F. 2d 602 (5th Cir. 1968).

194/ 391 F. 2d 512 (5th Cir. 1968).

195/ 409 F. 2d 964 (10th Cir. 1969).

196/ In Samora v. United States, 406 F 2d 1095 (5th Cir. 1969), the defendant, having given a confession after inadequate warnings, and having later been given valid warnings, volunteered without interrogation a statement incriminating himself and exculpating his brother. The Fifth Circuit, relying strongly on the fact that there was apparent motivation to exculpate his companion and on the fact that no interrogation had preceded the statement, held that Westover did not require exclusion.

In another case, United States v. Knight, 197/ local police failed to warn the defendant properly, yet a later confession to the FBI was held admissible. The court distinguished Westover because here the questioning by local police had been brief, 198/ and it had taken place in the defendant's own home where he had invited the police. The court stressed the total lack of a coercive atmosphere, pointing to the fact that when the FBI agent arrived at the defendant's home the agent directed that the police handcuffs be removed from the defendant before he spoke to him. Citing Evans, 199/ the court found that under the totality of the circumstances there was no causal relationship between the failure of the local police to warn the defendant and the later confession to the FBI. 200/

Consequently, unless a court finds a causal connection between the earlier improper interrogation and the later confession, Westover will not be held to require suppression of the later statement. In addition, even assuming a causal connection, it appears that if the government can show that the information in the statement could easily have been obtained without the benefit of the statement, exclusion is not necessary. 201/

197/ 395 F. 2d 971 (2d Cir. 1968).

198/ The Seventh Circuit has also cited the briefness of a local interrogation as a factor in distinguishing Westover. United States v. Hale, 397 F. 2d 427 (7th Cir. 1968), cert. denied, 393 U.S. 1067 (1969).

199/ Supra, note 204.

200/ The court in Knight also suggested that there may have been no custodial interrogation when the defendant made his first statement to local police, but resolution of this question was not necessary to the decision.

201/ See Toohey v. United States, 404 F. 2d 907 (9th Cir. 1968).